# The Derivative and Discretionary-Function Immunities of Presidential and Congressional Aides in Constitutional Tort Actions

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## I. INTRODUCTION

In recent years the United States Supreme Court has considered many complex questions concerning official immunity defenses in so-called "constitutional tort" actions—the actions extended by 42 U.S.C. § 1983[1] for violations of constitutional rights[2] by persons acting under color of state law and by *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*[3] for such violations by persons acting under color of federal law. Of the numerous questions these actions have generated,[4] those raised by official immunity defenses[5] are among the most prob-

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The author gratefully acknowledges indebtedness to her colleagues Dean Claude R. Sowle and Professors Kenneth Casebeer, Bernard H. Oxman, and Thomas A. Robinson for their critical evaluations of the original manuscript and to Mr. Steven E. Eisenberg, a student in the University of Miami School of Law, for his valuable research assistance.

1. Section 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1976) (as amended by Act of Dec. 29, 1979, Pub. L. No. 96–170, § 1, 93 Stat. 1284, 1284).

Although this provision was enacted as Section 1 of the Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (1878), it was in virtual disuse until "resurrected" in Monroe v. Pape, 365 U.S. 167 (1961). *See Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977).

2. For a discussion of the limited availability of the § 1983 remedy for violations of purely statutory federal rights, see Note, *The Section 1983 Remedy and Purely Statutory Federal Rights*: Ryans v. New Jersey Commission for the Blind and Visually Impaired, 1983 B.Y.U. L. REV. 465.

3. 403 U.S. 388 (1971). It should be noted that *Bivens* actions could be eliminated in 1984. See Nat'l L.J., Dec. 12, 1983, at 15. Bills pending in both houses of Congress would substitute actions against the federal government under the Federal Tort Claims Act, ch. 753, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 U.S.C.) for actions against governmental employees under *Bivens*. *See* Nat'l L.J., Dec. 12, 1983, at 15. The current stumbling block to passage of these bills is a debate over whether official immunity defenses should be available in the substituted action. The administration favors preserving these defenses, while several groups, including the American Civil Liberties Union, oppose use of these defenses in actions against the government. *Id.*

4. For comprehensive reviews of § 1983 and *Bivens* issues, see S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION (1979); Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482 (1982).

Constitutional tort actions have also generated important aspects of the controversy over the proper role of the judiciary in "public law" litigation. For discussions of a cluster of problems being debated as "public versus private law" issues, see Casebeer, Toward a Critical Jurisprudence—A First Step by Way of the Public-Private Distinction in Constitutional Law (to be published in 37 U. MIAMI L. REV. — (1983)); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); *The Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982).

5. *See* Harlow v. Fitzgerald, 102 S. Ct. 2727 (1982); Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique*, 72 NW. U.L. REV. 526 (1977); Shuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 SUP. CT. REV. 281; Sowle, *Qualified Immunity in Section 1983 Cases: The Unresolved Issues of the Conditions for Its Use and the Burden of Persuasion*, 55 TUL. L. REV. 326 (1981); Comment, *Allocating Liability for Constitutional Torts: Reconciling the Official's Liability for Unconstitutional Conduct, the Entity's Liability for Unconstitutional Official Policy, and the Immunity Doctrines*, 46 ALB. L. REV. 475 (1982); Comment, *Immunity of Federal Executive Officials to Damage Suits for Constitutional Violations*, 19 HOUS. L. REV. 299 (1982).

lematic because they require the Court to strike a difficult balance between the public interest in effective performance of official duties and the opposing interest in civil redress and deterrence of constitutional wrongs.[6]

The type of official immunity the Court has considered most often is discretionary-function immunity. This immunity may be absolute or qualified, but in either form it protects the defendant official from liability for the consequences of his decisions when the court determines that the need for protecting the official's decisionmaking functions outweighs the competing interests.[7] A second type of immunity the Court has considered is derivative immunity. Although this immunity protects the defendant official from liability for the consequences of his actions, its purpose is to protect, not the discretionary functions of the defendant official, but those of the defendant's superior officer.[8] For the most part, the Court has developed the rules governing discretionary-function immunity with reasonable clarity and proper attention to the various interests at stake.[9] In contrast, however, the Court has failed to delineate the rules governing derivative immunity with adequate clarity or proper identification of the specific interests involved.[10] The Court has used an overly broad "functional" approach[11] that is too blunt a tool for a clear demarcation of all the relevant concerns.

A complicated series of events that began in 1968 with whistle-blowing on Air Force cost overruns and later involved developments in the Watergate hearings[12] ultimately produced constitutional tort actions presenting the Court with difficult issues concerning both discretionary-function and derivative immunity. The Court resolved those issues in two controversial, interrelated decisions, *Nixon v. Fitzgerald*[13] and *Harlow v. Fitzgerald*.[14] This Article concerns the poorly rationalized derivative-immunity holding in *Harlow*, which has produced problems of predictability concerning the immunity defenses of both presidential and congressional aides and could lead to decisions on these defenses that would strike an improper balance between the significant interests at stake.

## II. *HARLOW V. FITZGERALD*

On November 13, 1968, A. Ernest Fitzgerald, a management analyst in the Department of the Air Force, appeared before a congressional subcommittee and

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6. *See* Harlow v. Fitzgerald, 102 S. Ct. 2727, 2736 (1982); Butz v. Economou, 438 U.S. 478, 503 (1978); Imbler v. Pachtman, 424 U.S. 409, 427–28 (1976); Wood v. Strickland, 420 U.S. 308, 318–22 (1975). *Bivens* actions against federal officials also may present constitutional issues concerning the separation-of-powers doctrine. *See, e.g.*, Nixon v. Fitzgerald, 102 S. Ct. 2690, 2701–04 (1982); Harlow v. Fitzgerald, 102 S. Ct. 2727, 2735 n.17 (1982).

7. *See infra* text accompanying notes 50–79 and 116–18.

8. *See infra* text accompanying notes 114–27.

9. *See infra* text accompanying notes 50–79. *But see* Sowle, *supra* note 5, at 349–54 (criticizing Procunier v. Navarette, 434 U.S. 555 (1978), for its failure to distinguish between issues of discretionary-function and ministerial immunities).

10. *See infra* text parts IV–VI.

11. *Id.*

12. *See infra* note 24.

13. 102 S. Ct. 2690 (1982).

14. 102 S. Ct. 2727 (1982).

testified to massive cost overruns on the C-5A transport plane.[15] In January 1970 the Air Force eliminated Fitzgerald's position in a "departmental reorganization and reduction in force" taken "to promote economy and efficiency in the armed forces."[16] Fitzgerald was dismissed from his job and received no offer of alternative federal employment.[17]

Fitzgerald instituted proceedings before the Civil Service Commission, which found that the elimination of his job had been motivated by "reasons purely personal to" Fitzgerald.[18] He won a back pay order and, after further protracted proceedings, reached a settlement agreement with the Air Force under which he was to resume his former position on June 21, 1982.[19]

In addition to the Commission proceedings, Fitzgerald brought an action for civil damages in the United States District Court against former President Richard M. Nixon and two of Nixon's senior White House aides, Bryce Harlow[20] and Alexander Butterfield.[21] Fitzgerald alleged that, in violation of his rights under two federal statutes[22] and the first amendment to the Constitution,[23] the defendants had conspired to retaliate for his congressional testimony by depriving him of his Air Force job, denying him reemployment, and besmirching his reputation.[24] He averred that the defendants' actions were taken in their official capacities.[25]

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15. Nixon v. Fitzgerald, 102 S. Ct. 2690, 2693–94 (1982). Fitzgerald also testified that unforeseen technical difficulties had been encountered in the development of the plane. *Id.*

16. *Id.* at 2693.

17. *Id.* at 2695.

18. *Id.* at 2696. The Commission ruled that the evidence did not support Fitzgerald's allegation that his dismissal was in retaliation for his congressional testimony. *Id.* Instead, it ruled that the dismissal resulted from his superiors' dissatisfaction with his job performance, as evidenced by "statements that he was not a 'team player' and 'not on the Air Force team.' " *Id.* at 2696 n.16. It further held that a "reduction in force" could not be used to dismiss Fitzgerald for reasons "personal" to him. *Id.*

For a recent review and evaluation of remedies available to "whistleblowers," see Vaughn, *Statutory Protection of Whistleblowers in the Federal Executive Branch*, 1982 U. ILL. L. REV. 615.

19. Nixon v. Fitzgerald, 102 S. Ct. 2690, 2696 n.17 (1982).

20. Bryce Harlow served as a presidential aide to President Richard Nixon from January 1969 through November 1969. On November 4, 1969, Harlow assumed the cabinet-level position of Counsellor to the President. Harlow left this position in December 1970 to return to private life. He resumed the position of Counsellor on July 1, 1973, and served through April 14, 1974. *Harlow*, 102 S. Ct. 2727, 2730, n.1 (1982).

21. Alexander Butterfield served the White House as Deputy Assistant to the President and as Deputy Chief of Staff to H. R. Haldeman until March 1973. *Id.* at 2731 & n.6.

22. The statutes relied on by Fitzgerald are 5 U.S.C. § 7211 (Supp. III 1979) ("The right of employees . . . to . . . furnish information to either House of Congress, or to a committee or a Member thereof, may not be interfered with or denied.") and 18 U.S.C. § 1505 (1976) (a criminal statute prohibiting obstruction of congressional testimony). Neither statute expressly grants a right to civil damages for its violation. Fitzgerald's theory was that a private cause of action for damages could be inferred under each statute. *See* Nixon v. Fitzgerald, 102 S. Ct. 2690, 2697 n.20 (1982); *Harlow*, 102 S. Ct. 2727, 2732 & n.10 (1982).

Regarding the statutory actions, an ironic historical footnote in Fitzgerald's Supreme Court brief states as follows:

> As a Senator, Mr. Nixon sponsored a proposed amendment to [18 U.S.C. § 1505] that would have created a presumption that adverse personnel actions against a congressional witness within one year of his testimony were retaliatory. *See* S. Rep. No. 414, 82d Cong., 1st Sess. 3 (1951). Senator Nixon said in support of his amendment, "Unless protection is given to witnesses who are members of the armed services or employees of the Government, the scheduled hearings will amount to no more than a parade of yes men for administration policies as they exist." 97 CONG. REC. 439394 (1951).

Brief for Respondent at 33 n.40, Nixon v. Fitzgerald, 102 S. Ct. 2690 (1982).

23. The pertinent first amendment language provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.

24. Nixon v. Fitzgerald, 102 S. Ct. 2690, 2697 n.19, 2705 (1982).

Fitzgerald initially brought suit against Butterfield, several Department of Defense and Air Force officials, and "Other Persons Including but Not Limited to One or More White House Aides, Whose Identities Are at This Time Unknown to the Plaintiff, but Who Are Designated Herein as John Does." Fitzgerald v. Seamans, 553 F.2d 220, 229 n.16

The district court denied the defendants' motions for summary judgment, holding that Fitzgerald had stated triable causes of action for violation of his statutory and constitutional rights and that none of the defendants was entitled to absolute immunity by reason of his official position.[26] The Court of Appeals for the District of Columbia Circuit dismissed without opinion the defendants' collateral appeals from the district court's denials of immunity.[27] The Supreme Court granted a petition for certiorari in *Nixon v. Fitzgerald* to consider the scope of immunity available to the President of the United States.[28] It also granted a petition for certiorari in *Harlow v. Fitzgerald* to determine the scope of immunity available to the President's senior aides and advisers.[29]

In *Nixon v. Fitzgerald*[30] the Supreme Court held, in a five to four decision, that Nixon, "as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts."[31] The Court considered

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(D.C. Cir. 1977). More than three years had elapsed between Fitzgerald's discharge and the filing of his action. The district court granted the defendants' motions for summary judgment on the ground that D.C. CODE § 12-301(8) (1973), which provided a three year statute of limitations for actions not otherwise enumerated, barred Fitzgerald's complaint. Fitzgerald v. Seamans, 384 F. Supp. 688, 690 (D.D.C. 1974), *aff'd in part, rev'd in part*, 553 F.2d 220 (D.C. Cir. 1977).

The United States Court of Appeals for the District of Columbia Circuit affirmed with respect to the Air Force and Defense Department officials, but reversed with respect to Butterfield. 553 F.2d 220, 229 (D.C. Cir. 1977). Because Fitzgerald did not discover the White House involvement in the alleged conspiracy to terminate his job until the Watergate hearings on August 31, 1973, the court held that the statute of limitations had tolled. Under the equitable doctrine of "discovery-diligence," the court found that a "defendant's fraud or deliberate concealment of material facts" tolled the statute of limitations until the plaintiff discovered, or could have discovered with reasonable diligence, the basis of the lawsuit. *Id.* at 228. Since it was only by chance that a memorandum implicating Butterfield appeared during the hearings, the statute did not run until that time. The memorandum, written by Butterfield to H. R. Haldeman, White House Chief of Staff, described Fitzgerald as a " 'basic nogoodnik' who 'must be given very low marks in loyalty.' " *Id.* at 225. The memorandum went on to state: "We should let him bleed, for a while at least. Any rush to pick him up and put him back on the Federal payroll would be tantamount to an admission of earlier wrong-doing on our part." *Id.* Following extensive discovery after remand, Fitzgerald was permitted to amend his complaint to include Nixon and Harlow as defendants. Nixon v. Fitzgerald, 102 S. Ct. 2690, 2697 (1982).

25. Nixon v. Fitzgerald, 102 S. Ct. 2690, 2693 (1982); *Harlow*, 102 S. Ct. 2727, 2730 (1982).

26. Nixon v. Fitzgerald, 102 S. Ct. 2690, 2697 (1982); *Harlow*, 102 S. Ct. 2727, 2732 (1982).

27. Nixon v. Fitzgerald, 102 S. Ct. 2690, 2697 (1982); *Harlow*, 102 S. Ct. 2727, 2732 (1982).

28. 452 U.S. 959 (1981).

29. *Id.* The Court had an earlier opportunity to reach these issues when it granted certiorari in Kissinger v. Halperin, 446 U.S. 951 (1980), to review a court of appeals decision granting only qualified immunity in a *Bivens* action to former President Richard M. Nixon, former Attorney General John N. Mitchell, and former Presidential Aide H. R. Haldeman. Halperin v. Kissinger, 606 F.2d 1192 (D.C. Cir. 1979), *aff'd in part, cert. dismissed in part*, 452 U.S. 713 (1981). In a brief per curiam opinion, the Court affirmed the court of appeals decision by an equally divided vote. Kissinger v. Halperin, 452 U.S. 713 (1981) (Rehnquist, J., taking no part in the consideration or decision of the case).

The action was brought by a former member of the National Security Council staff, his wife, and his children for money damages for alleged violation of their fourth amendment rights from a wiretap of their home telephone. They also alleged violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20 (1976). 606 F.2d 1192, 1195 (D.C. Cir. 1979). The court of appeals held that Mitchell and Haldeman could claim only a qualified immunity under Butz v. Economou, 438 U.S. 478 (1978), and would be entitled to such immunity if they could "show that they had reasonable grounds for believing their actions were legal . . . and that there was no malice or bad faith in either the initiation or the conduct of the wiretapping." 606 F.2d 1192, 1208 (D.C. Cir. 1979). Unwilling to hold that Nixon's "status as President sets him apart from the other high Executive officials named as defendants to this action," *id.* at 1210, the court held that Nixon was not entitled to absolute immunity. The court considered that qualified immunity gave sufficient protection to "satisfy our concern that suits like this one would place major unwarranted demands on a President's time." *Id.* at 1213. The court also considered that "the application of qualified immunity to defendant Nixon is mandated by our tradition of equal justice under law." *Id.*

30. 102 S. Ct. 2690 (1982).

31. *Id.* at 2701. Justice Powell delivered the opinion of the Court; Chief Justice Burger joined this opinion and wrote a separate concurring opinion. Justice White wrote a dissenting opinion, in which Justices Brennan, Marshall, and Blackmun joined. Justice Blackmun also wrote a dissenting opinion, in which Justices Brennan and Marshall joined.

absolute immunity "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history."[32]

In *Harlow v. Fitzgerald*,[33] however, the Court held, in an eight to one decision, that presidential aides "generally are entitled only to a qualified immunity."[34] Although the Court significantly broadened the scope of the qualified immunity defense,[35] it rejected the defendants' claim that derivative absolute immunity was

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32. *Id.*

33. 102 S. Ct. 2727 (1982).

34. *Id.* at 2734. Justice Powell delivered the opinion of the Court. Justice Brennan filed a concurring opinion, in which Justices Marshall and Blackmun joined. Justices Brennan, White, Marshall, and Blackmun filed a separate concurring statement. Justice Rehnquist filed a concurring opinion. Chief Justice Burger filed a dissenting opinion.

*Harlow* did not consider an issue relevant to Fitzgerald's action that later was resolved in Bush v. Lucas, 51 U.S.L.W. 4752 (U.S. 1983). *See Harlow*, 102 S. Ct. 2727, 2740 n.36 (1982). *Bush* held that a *Bivens* action is unavailable as a damages remedy "for federal employees whose First Amendment rights are violated by their superiors." 51 U.S.L.W. 4752, 4753 (U.S. 1982). In *Bivens* the Court extended a damages remedy directly under the Constitution for violation of the plaintiff's fourth amendment rights by federal law enforcement officers. 403 U.S. 388, 395–96 (1971). The Court in *Bivens* observed, "The present case involves no special factors counselling hesitation in the absence of affirmative action by Congress." *Id.* at 396. In *Bush*, however, the Court found "special factors counselling hesitation" in the "'federal personnel policy' " reflected in the civil service remedial scheme for handling employee grievances. 51 U.S.L.W. 4752, 4756–59 (U.S. 1983). The Court declined to recognize a damages remedy, stating:

> Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service. Not only has Congress developed considerable familiarity with balancing government efficiency and the rights of employees, but it also may inform itself through factfinding procedures such as hearings that are not available to the courts.

*Id.* at 4758.

Had the holding in *Bush* come sooner, Fitzgerald's *Bivens* action clearly would have failed. After remand by the Supreme Court, however, his action was settled before the Court rendered its decision in *Bush*. Telephone interview with John E. Nolan, Jr., Esq., who represented Fitzgerald before the Supreme Court (July 27, 1983).

Fitzgerald's statutory actions, however, would have been unaffected by *Bush*, which concerned only an action for violation of first amendment rights. The Court in *Harlow* did not consider the legal sufficiency of the statutory actions, stating only that

> [w]e do not view petitioners' argument on the statutory question as insubstantial. Cf. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 72 L. Ed. 2d 182, 102 S. Ct. 1825 (1982) (controlling question in implication of statutory causes of action is whether Congress affirmatively intended to create a damages remedy) . . . .

102 S. Ct. 2727, 2740 n.36 (1982).

35. In *Harlow* the Court observed that its previous decisions had defined qualified or "good faith" immunity as having both an "objective" and a "subjective" element. 102 S. Ct. 2727, 2737 (1982). The Court stated:

> Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if an official "*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], *or* if he took the action *with malicious intention* to cause a deprivation of constitutional rights or other injury . . . ."

*Id.* (emphasis in original) (quoting Wood v. Strickland, 420 U.S. 308, 321–22 (1975)).

In Butz v. Economou, 438 U.S. 478 (1978), the Court had considered that this definition of qualified immunity was an appropriate accommodation of competing values, in part because it would permit "[i]nsubstantial lawsuits [to] be quickly terminated" on summary judgment. 438 U.S. 478, 507–08 (1978). In *Harlow*, however, the Court decided that "[t]he subjective element of the good faith defense frequently has proved incompatible with our admonition in *Butz* that insubstantial claims should not proceed to trial." 102 S. Ct. 2727, 2737 (1982). Concerned that "substantial costs attend the litigation of the subjective good faith of government officials," *id.* at 2738, and that "[i]nquiries of this kind can be peculiarly disruptive of effective government," *id.*, the Court redefined qualified immunity to omit the malice limitation on the privilege. *Id.*

It should be noted that, although the Court generally has referred to the malice component as the subjective element, *see Harlow*, 102 S. Ct. 2727, 2737 (1982), there actually have been two subjective components: (1) the malice element, and (2) the knowledge element. The official was not entitled to qualified immunity (1) if he acted "with the malicious intention to cause a deprivation of constitutional rights or other injury," Wood v. Strickland, 420 U.S. 308, 322 (1975), or (2) if he "knew . . . that the action he took . . . would violate the constitutional rights of the [plaintiff]," *id.* In

*Harlow* the Court said it was "defining the limits of qualified immunity essentially in objective terms." 102 S. Ct. 2727, 2739 (1982). The Court also stated: "We . . . hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 102 S. Ct. 2727, 2738 (1982). The Court, however, preserved a role for the subjective knowledge element as a component limiting the immunity. In describing the operation of qualified immunity, as redefined, the Court stated:

> On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he *neither knew nor should have known* of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

*Id.* at 2739 (footnote omitted) (emphasis added). This statement appears to mean that if the law was *not* clearly established, liability is totally precluded. If, however, the law *was* clearly established, then the defendant is subject to liability if he knew of the relevant legal standard, even though a reasonable person in the same or similar circumstances would not have known of it.

Justice Brennan's concurring opinion in *Harlow*, in which Justices Marshall and Blackmun joined, confirms this continued role of the knowledge element of the redefined immunity. The opinion states as follows:

> I agree with the substantive standard announced by the Court today, imposing liability when a public-official defendant "knew or should have known" of the constitutionally violative effect of his actions. This standard would not allow the official who *actually knows* that he was violating the law to escape liability for his actions, even if he could not "reasonably have been expected" to know what he actually did know. Thus the clever and unusually well-informed violator of constitutional rights will not evade just punishment for his crime.

*Id.* at 2740 (Brennan, J., concurring) (citation omitted). For a critical view of *Harlow's* redefinition of qualified immunity, see *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 1, 233–36 (1982). *See also* Freed, *supra* note 5, at 551–62. This pre-*Harlow* article argues that an official who has violated the constitutional rights of the plaintiff should not be protected by qualified immunity, even if those rights were not clearly established at the time of the violation, if the official acted "out of a desire to injure the plaintiff," *id.* at 556, or if he acted unreasonably—the question of the unsettled state of law being only one factor to be considered on the issue of reasonableness, *id.* at 557.

The Court's redefinition of qualified immunity in *Harlow* has been held to apply not only to *Bivens* actions, but also to § 1983 actions. *See* Galvan v. Garmon, 710 F.2d 214 (5th Cir. 1983). This view no doubt is correct. In *Harlow* the Court observed:

> This case involves no issue concerning the elements of the immunity available to state officials sued for constitutional violations under § 1983. We have found previously, however, that "it would be untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials."

102 S. Ct. 2727, 2738 n.30 (1982) (quoting Butz v. Economou, 438 U.S. 478, 504 (1978)).

It also is worth noting that, in redefining qualified immunity, the *Harlow* Court may have resolved most of the burden of persuasion issues concerning qualified immunity. In Gomez v. Toledo, 446 U.S. 635 (1980), the Court held that the defendant has the burden of pleading qualified immunity as an affirmative defense. *Id.* at 640. *Gomez*, however, did not resolve the burden of persuasion question. *Id.* at 642 (Rehnquist, J., concurring). *See Harlow*, 102 S. Ct. 2727, 2737 n.24 (1982). Lower courts have differed on this issue. Sowle, *supra* note 5, at 393–94. For contrary views as to where this burden should be placed, compare *id.* at 393–402 (arguing that the defendant should bear this burden), with Freed, *supra* note 5, at 562–63 (arguing that the plaintiff should bear the burden to show subjective bad faith, while the defendant should bear the burden to show the reasonableness of his conduct).

In *Harlow* the Court gave no indication concerning the burden of persuasion on the issue whether the law was "clearly established" at the time of the conduct in question. This issue, however, appears to be a question of law, not one of fact. *See* 102 S. Ct. 2727, 2739 (1982) ("On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred."). Consequently, the question who has the burden of persuasion may not be a significant issue.

Under *Harlow*, if the law was not clearly established, the defendant is entitled to qualified immunity, assuming, of course, that he was acting within the scope of his authority. *Id.* It appears from *Harlow* that the defendant has the burden to show he was so acting, because the Court specifically placed the burden on the defendant to make such a showing in the analogous context of absolute immunity. *See id.* at 2735–36. If the law was clearly established, the defendant appears to bear the burden of persuasion on the remaining qualified immunity issues. The Court stated:

> If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and *can prove* that he neither knew nor should have known of the relevant legal standard, the defense should be sustained.

*Id.* at 2739 (emphasis added).

"made essential by all the considerations that support absolute immunity for the President himself."[36] The Court distinguished its 1972 decision in *Gravel v. United States*,[37] which granted derivative absolute immunity to the "legislative acts" of a Senator's aide under the speech or debate clause of the Constitution.[38] The Court also rejected the defendants' argument that their "special functions" warrant absolute immunity for White House aides in the performance of all their duties.[39] The Court held that its 1978 decision in *Butz v. Economou*[40] controlled the scope of immunity of presidential aides. *Butz* held that, in an action for damages for the violation of the plaintiff's constitutional rights, a cabinet officer was entitled to only a qualified immunity.[41]

Chief Justice Burger dissented, stating, "I am at a loss . . . to reconcile this conclusion with our holding in *Gravel v. United States*."[42] He regarded *Butz* as "clearly distinguishable"[43] and stated: "If indeed there is an irreconcilable conflict between *Gravel* . . . and *Butz* . . . the Court has an obligation to try to harmonize its holdings—or at least tender a reasonable explanation. The Court has done neither."[44]

This Article examines the question whether *Harlow*'s denial of derivative absolute immunity legitimately can be reconciled with both *Butz* and *Gravel*. It takes the position that *Harlow* and *Butz* easily can be reconciled,[45] and that *Harlow* and *Gravel* legitimately can be reconciled, but not on the grounds employed by the Court.[46] In the process of comparing *Harlow* and *Gravel*, the Article attempts to clarify the fundamental differences between discretionary-function and derivative immunity[47]—differences that the Court in *Harlow* failed to delineate. This Article concludes with the identification of several important questions regarding the immunity of presidential and congressional aides as yet unresolved by the Court.[48] It proposes answers to some, if not all, of these questions and sets forth the questions that should be addressed if these issues are to be resolved in a defensible manner giving adequate protection to the competing constitutional values.

## III. The Court's Reconciliation of *Harlow* and *Butz v. Economou* on the Issue of Discretionary-Function Immunity

The Court's decision in *Harlow* that no blanket absolute immunity attaches to the "special functions" of senior presidential aides appears entirely consistent with

36. 102 S. Ct. 2727, 2734 (1982).

37. 408 U.S. 606 (1972).

38. 102 S. Ct. 2727, 2734 (1982). The speech or debate clause is contained in U.S. Const. art. I, § 6, cl. 1, which reads as follows:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

39. 102 S. Ct. 2727, 2735–36 (1982).

40. 438 U.S. 478 (1978).

41. *Id.*

42. 102 S. Ct. 2727, 2741 (1982) (Burger, C.J., dissenting) (citation omitted).

43. *Id.*

44. *Id.* at 2741 n.2.

45. *See infra* part III.

46. *See infra* parts IV–V.

47. *See infra* notes 116–35 and accompanying text.

48. *See infra* part VI.

*Butz v. Economou* and other Supreme Court decisions in constitutional tort cases concerning the immunity of executive officers exercising discretionary functions.[49]

Traditionally, the common law has extended some form of immunity to government officers from civil damage liability for the exercise of discretionary functions.[50] Governmental decisionmaking has been protected for two fundamental reasons: (1) the unfairness of asking officials to exercise discretion, only to require that they later be judged on the validity of their decisions, and (2) the danger that subjecting officials to civil litigation will impede the effective operation of government by distracting them from their duties, discouraging "fearless decisionmaking," and deterring responsible persons from seeking office.[51]

In both common-law and constitutional tort actions, the Supreme Court has granted absolute immunity to government officers exercising adjudicative, prosecutorial, and legislative functions.[52] In common-law tort actions, the Court has granted absolute immunity to federal officers in the exercise of discretionary executive functions.[53] In constitutional tort actions, however, the Court has been less generous; except for its grant of absolute immunity to the President in *Nixon v. Fitzgerald*,[54] the Court has granted only a qualified immunity to executive officers in section 1983 and *Bivens* actions.[55]

Section 1983 makes no reference to immunity defenses.[56] The Court, however, has held that "'immunities 'well grounded in history and reason' [have] not been abrogated 'by covert inclusion in the general language' of § 1983.'"[57] The provision "is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them."[58] The Court's section 1983 immunity decisions,

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49. As noted *supra* note 35, the *Harlow* opinion appears to clarify some previously unresolved questions concerning the burden of persuasion on qualified immunity issues. The opinion also contains an interesting dictum relevant to a question raised by Procunier v. Navarette, 434 U.S. 555 (1978), concerning whether in constitutional tort actions qualified immunity is available to all government employees or only to those exercising discretionary functions. *See* Sowle, *supra* note 5, at 354–93 (arguing that *Navarette* should not be interpreted as extending qualified immunity to officers exercising purely ministerial functions and discussing what defenses should be available to these officers); *see also* Freed, *supra* note 5, at 551 (interpreting Scheuer v. Rhodes, 416 U.S. 232 (1974), as extending qualified immunity to all executive officers in constitutional tort actions, not only to those exercising discretionary functions). In *Harlow* the Court stated, "Immunity generally is available only to officers performing discretionary functions." 102 S. Ct. 2727, 2738 (1982). In his concurring opinion, Justice Brennan observed, "I . . . agree that [the qualified immunity test adopted by the Court in *Harlow*] applies 'across the board,' to all 'government officials performing discretionary functions.' " *Id.* at 2740 (Brennan, J., concurring) (quoting *id.* at 2738).

50. *Harlow*, 102 S. Ct. 2727, 2732 (1982); Sowle, *supra* note 5, at 353.

51. Freed, *supra* note 5, at 529–30; Sowle, *supra* note 5, at 386–87. In *Harlow* the Court stated, "As recognized at common law, public officers require [some form of immunity from suits for damages] to shield them from undue interference with their duties and from potentially disabling threats of liability." 102 S. Ct. 2727, 2732 (1982). The Court also acknowledged " ' the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.' " *Id.* at 2733 (quoting Butz v. Economou, 438 U.S. 478, 506 (1978)).

52. *Harlow*, 102 S. Ct. 2727, 2732–33 (1982) (citing Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) (legislative functions); Stump v. Sparkman, 435 U.S. 349 (1978) (judicial functions); Butz v. Economou, 438 U.S. 478 (1978) (prosecutorial functions)).

53. *Harlow*, 102 S. Ct. 2727, 2732 (1982) (citing Barr v. Matteo, 360 U.S. 564 (1959); Spalding v. Vilas, 161 U.S. 483 (1896)).

54. 102 S. Ct. 2690 (1982).

55. *Harlow*, 102 S. Ct. 2727, 2732 (1982) (citing Butz v. Economou, 438 U.S. 478 (1978)).

56. For language of § 1983, see *supra* note 1.

57. Imbler v. Pachtman, 424 U.S. 409, 418 (1976) (quoting Tenney v. Brandhove, 341 U.S. 367, 376 (1951)).

58. Imbler v. Pachtman, 424 U.S. 409, 418 (1976).

therefore, have been "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it."[59]

The Court has considered not only the common-law immunities and the interests they protect, but also the purposes underlying section 1983. Thus, only if the Court has found that recognition of an immunity is consistent with the purposes of section 1983 has it granted the claimed immunity. In *Scheuer v. Rhodes*[60] the Court refused to grant absolute immunity to a state governor and other high state officials, despite common-law precedent for the recognition of their absolute immunity.[61] The Court acknowledged its prior section 1983 decisions recognizing the absolute immunity of legislators for their legislative acts and of judges acting within their judicial role. The legislative immunity was justified because "it was highly improbable that 'Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language . . . ' of this statute."[62] Judicial absolute immunity was justified because "had the Congress intended to abolish the common-law 'immunity of judges for acts within the judicial role,' it would have done so specifically."[63] Concerning the importance of judicial absolute immunity, the Court observed that a judge's errors may be corrected on appeal and that the burden of the fear of lawsuits from dissatisfied litigants charging malice or corruption "would contribute not to principled and fearless decision-making but to intimidation."[64] In contrast, however, the Court concluded that absolute immunity of executive officials in the exercise of discretionary functions would be inconsistent with the purposes of section 1983. The Court stated:

> It can hardly be argued, at this late date, that under no circumstances can the officers of state government be subject to liability under this statute. In *Monroe v. Pape*, Mr. Justice Douglas, writing for the Court, held that the section in question was meant "to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." 365 U.S. at 172. Through the Civil Rights statutes, Congress intended "to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Id.* at 171–172.
>
> Since the statute relied on thus included within its scope the "' [m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law,"' *id.*, at 184 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)), government officials, as a class, could not be totally exempt, by virtue of some absolute immunity, from liability under its terms. Indeed, as the Court also indicated in *Monroe v. Pape*, the legislative history indicates that there is no absolute immunity.[65]

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59. *Id.* at 421.

60. 416 U.S. 232 (1974).

61. *See* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 29.10 (1956) [hereinafter cited as HARPER & JAMES]; W. PROSSER, THE LAW OF TORTS § 132, at 988 (4th ed. 1971).

62. 416 U.S. 232, 244 (1974) (quoting Tenney v. Brandhove, 341 U.S. 367, 376 (1951)).

63. *Id.* (quoting Pierson v. Ray, 386 U.S. 547, 554 (1967)) (citations omitted).

64. *Id.* (citing Pierson v. Ray, 386 U.S. 547, 554 (1967)).

65. *Id.* at 243 (some citations omitted).

The Court considered that

> [u]nder the criteria developed by precedents of this Court, § 1983 would be drained of meaning were we to hold that the acts of a governor or other high executive officer have "the quality of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government."[66]

In *Butz v. Economou*[67] the Court applied this same reasoning in a *Bivens* action,[68] denying absolute immunity to the Secretary of Agriculture and other federal executive officers exercising discretionary functions. Although actions alleging constitutional violations against federal officers are not governed by section 1983, the Court stated, "[I]n the absence of congressional direction to the contrary, there is no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement as authorized by *Bivens* than is accorded state officials when sued for the identical violation under § 1983."[69] The Court observed that "the cause of action recognized in *Bivens* would similarly be 'drained of meaning' if federal officials were entitled to absolute immunity for their constitutional transgressions."[70]

The Court said the issue before it was "how best to reconcile the plaintiff's right to compensation with the need to protect the decisionmaking processes of an executive department."[71] In resolving that issue, the Court stated:

> Our opinion in *Bivens* put aside the immunity question; but we could not have contemplated that immunity would be absolute. If, as the Government argues, all officials exercising discretion were exempt from personal liability, a suit under the Constitution could provide no redress to the injured citizen, nor would it in any degree deter federal officials from committing constitutional wrongs. Moreover, no compensation would be available from the Government, for the Tort Claims Act prohibits recovery for injuries stemming from discretionary acts, even when that discretion has been abused.[72]

The Court did not regard as controlling the decision in *Barr v. Matteo*,[73] in which a plurality of the Court extended absolute immunity to a federal executive officer in a common-law tort action because the officer was acting in the exercise of a discretionary function within the outer perimeter of his authority. The Court in *Butz* stated, "[W]e are confident that *Barr* did not purport to protect an official who has not only committed a wrong under local law, but also violated those fundamental principles of fairness embodied in the Constitution."[74] This lower level of immunity in constitutional tort actions against federal executive officials is defensible because "plaintiffs suing to challenge constitutional deprivations are vindicating not only

66. *Id.* at 248 (quoting Sterling v. Constantin, 287 U.S. 378, 397 (1932)).
67. 438 U.S. 478 (1978).
68. *See supra* text accompanying note 3.
69. 438 U.S. 478, 500 (1978).
70. *Id.* at 501 (citation omitted).
71. *Id.* at 503.
72. *Id.* at 505 (footnote omitted).
73. 360 U.S. 564 (1959).
74. 438 U.S. 478, 495 (1978) (footnote omitted).

private, but also public interests."[75] The availability of a damage award provides "a powerful incentive to the vindication of these public interests."[76]

The Court in *Butz* did not rule out the possibility that federal executive officers would be entitled to absolute immunity under special circumstances. It stated that "federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope."[77] Recognizing that "there are some officials whose special functions require a full exemption from liability,"[78] the Court held that executive officers exercising essentially judicial and prosecutorial functions are entitled to absolute immunity.[79]

Until *Nixon v. Fitzgerald*,[80] however, the Court did not extend absolute immunity to a federal executive officer except when the officer was exercising essentially judicial or prosecutorial functions. In *Nixon v. Fitzgerald* the Court held that the President is entitled to absolute immunity as "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history."[81] In *Harlow*, however, the Court held that the same reasons underlying its denial of absolute immunity to a cabinet officer in *Butz* required its denial to presidential aides of a blanket protection for their actions.[82] The Court stated:

> Having decided in *Butz* that members of the Cabinet ordinarily enjoy only qualified immunity from suit, we conclude today that it would be equally untenable to hold absolute immunity an incident of the office of every Presidential subordinate based in the White House. Members of the Cabinet are direct subordinates of the President, frequently with greater responsibilities, both to the President and to the Nation, than White House staff. The considerations that supported our decision in *Butz* apply with equal force to this case. It is no disparagement of the offices held by petitioners to hold that Presidential aides, like members of the Cabinet, generally are entitled only to a qualified immunity.[83]

The Court did not rule out the possibility that on remand Harlow and Butterfield could establish entitlement to absolute immunity,[84] but the Court suggested a narrow range of discretionary executive functions that might qualify for this protection. The Court observed that "[f]or aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy, absolute immunity might well be justified to protect the unhesitating performance of functions vital to the national interest."[85]

In dissent, Chief Justice Burger contended that *Butz* was distinguishable from *Harlow* because "[a] senior Presidential aide works more intimately with the Presi-

75. Freed, *supra* note 5, at 550.
76. *Id.* (footnote omitted).
77. 438 U.S. 478, 506 (1978).
78. *Id.* at 508.
79. *Id.* at 511–17.
80. 102 S. Ct. 2690 (1982).
81. *Id.* at 2701.
82. 102 S. Ct. 2727, 2733–34 (1982).
83. *Id.* at 2734.
84. *Id.* at 2736.
85. *Id.* at 2735.

dent on a daily basis than does a Cabinet officer, directly implementing Presidential decisions literally from hour to hour."[86] The Court, however, rejected this distinction between the cases, noting, "In recent years . . . such men as Henry Kissinger and James Schlesinger have served in both Presidential advisory and Cabinet positions. Kissinger held both posts simultaneously."[87] The Court considered it "impossible to generalize about the role of 'offices' in an individual President's administration without reference to the functions that particular officeholders are assigned by the President."[88] Therefore, the Court refused to consider the amount of daily contact with the President controlling.

The *Harlow* decision appears entirely consistent with the Court's previous decisions indicating that only in rare, compelling circumstances will the Court find that the interest in protecting the decisionmaking process of an executive officer so overrides the interest of a plaintiff in compensation for the violation of a constitutional right as to warrant absolute immunity.

## IV. The Court's Reconciliation of *Harlow* and *Gravel v. United States* on the Issue of Derivative Immunity

If *Harlow* is consistent with *Butz v. Economou* and other Supreme Court decisions concerning discretionary-function immunities, the question remains whether it can be reconciled with *Gravel v. United States*[89] and other decisions of the Court concerning derivative immunity.[90]

### A. Gravel v. United States

*Gravel* arose out of the actions of Senator Mike Gravel of Alaska in making public the contents of the celebrated Pentagon Papers, which the Defense Department had classified "Top-Secret."[91] On June 29, 1971, Senator Gravel, as Chairman, convened a midnight meeting of the Subcommittee on Buildings and Grounds of the Senate Public Works Committee. During the meeting he read extensively from a copy of the Pentagon Papers and then placed the entire forty-seven volume work into the public record. Subsequently the press reported that Senator Gravel's aides had contacted an editor of the M.I.T. Press and that Gravel himself had arranged for publication of the Pentagon Papers by Beacon Press.[92] A federal grand jury was convened to investigate possible criminal conduct concerning the release and publication of the Pentagon Papers. Among the witnesses subpoenaed to testify was Leonard S. Rodberg, an assistant to Senator Gravel. In the United States District Court, Rodberg

86. *Id.* at 2744 (Burger, C.J., dissenting).

87. *Id.* at 2734 n.14.

88. *Id.* at 2734–35 n.14.

89. 408 U.S. 606 (1972).

90. *See* Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); Doe v. McMillan, 412 U.S. 306 (1973). *Gravel*, *Eastland*, and *Doe* are discussed *infra* notes 131–32 and accompanying text.

91. 408 U.S. 606, 608 (1972). Popularly known as the "Pentagon Papers," this Defense Department study was entitled "History of the United States Decision-Making Process on Viet Nam Policy." *Id.* It had been classified as "Top Secret-Sensitive." *Id.*

92. *Id.* at 609–10.

moved to quash the subpoena, and Senator Gravel moved to intervene, to quash the Rodberg subpoena, and to require the government to specify the particular questions to be addressed to Rodberg. The Senator contended that requiring Rodberg to testify would violate the Senator's immunity under the speech or debate clause of the United States Constitution.[93] The district court overruled the motion to quash and to specify questions, but entered an order prohibiting certain categories of questions.[94]

The court of appeals affirmed the denial of the motion to quash, but altered the protective order to reflect its own views of the scope of the applicable privilege.[95] Both the United States and Senator Gravel petitioned for certiorari, and the Supreme Court granted both petitions.[96] The court of appeals' ruling that the Senator's aides could not be questioned with respect to legislative acts was among the rulings challenged by the United States.[97] The Supreme Court held, however, that "the Speech or Debate Clause applies not only to a Member [of Congress] but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself."[98] The Court stated the reasons for this holding as follows:

> [I]t is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos; and that if they are not so recognized, the central role of the Speech or Debate Clause—to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary—will inevitably be diminished and frustrated.[99]

In response to the United States' fear of abuses "when legislators are invested

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93. *Id.* at 608–09.

94. United States v. Doe, 332 F. Supp. 930 (D. Mass. 1971), *modified*, 455 F.2d 753 (1st Cir.), *vacated sub nom.* Gravel v. United States, 408 U.S. 606 (1972). The protective order entered by the district court read as follows:

> (1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971 nor about things done by the Senator in preparation for and intimately related to said meeting.
>
> (2) Dr. Leonard S. Rodberg may not be questioned about his own actions on June 29, 1971 after having been engaged as a member of Senator Gravel's personal staff to the extent that they were taken at the Senator's direction either at a meeting of the Subcommittee on Public Buildings and Grounds or in preparation for and intimately related to said meeting.

*Id.* at 938; *Gravel*, 408 U.S. 606, 611 n.8 (1972).

95. United States v. Doe, 455 F.2d 753 (1st Cir.), *vacated sub nom.* Gravel v. United States, 408 U.S. 606 (1972). The protective order was modified by the court of appeals to read as follows:

> (1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971, nor, if the questions are directed to the motives or purposes behind the Senator's conduct at that meeting, about any communications with him or with his aides regarding the activities of the Senator or his aides during the period of their employment, in preparation for and related to said meeting.
>
> (2) Dr. Leonard S. Rodberg may not be questioned about his own actions in the broadest sense, including observations and communications, oral or written, by or to him or coming to his attention while being interviewed for, or after having been engaged as a member of Senator Gravel's personal staff to the extent that they were in the course of his employment.

*Gravel*, 408 U.S. 606, 612–13 (1972).

96. *Gravel*, 408 U.S. 606, 613 (1972).

97. *Id.*

98. *Id.* at 618.

99. *Id.* at 616–17 (citation omitted).

with the power to relieve others from the operation of otherwise valid civil and criminal laws,"[100] the Court stated, in part, as follows:

> But these abuses, it seems to us, are for the most part obviated if the privilege applicable to the aide is viewed, as it must be, as the privilege of the Senator, and invocable only by the Senator or by the aide on the Senator's behalf, and if in all events the privilege available to the aide is confined to those services that would be immune legislative conduct if performed by the Senator himself. This view places beyond the Speech or Debate Clause a variety of services characteristically performed by aides for Members of Congress, even though within the scope of their employment. It likewise provides no protection for criminal conduct threatening the security of the person or property of others, whether performed at the direction of the Senator in preparation for or in execution of a legislative act or done without his knowledge or direction.[101]

Dissenting in *Harlow*, the Chief Justice considered *Gravel*'s rationale for the extension of derivative immunity to a congressional aide to mandate a similar extension of derivative immunity to presidential aides.[102] The Chief Justice asked, "How can we conceivably hold that a President of the United States, who represents a vastly larger constituency than does any Member of Congress, should not have 'alter egos' with comparable immunity?"[103] He further stated: "Absent equal protection for a President's aides, how will Presidents be free from the risks of 'intimidation . . . by [Congress] and accountability before a possibly hostile judiciary?' Under today's holding in this case the functioning of the Presidency will inevitably be 'diminished and frustrated.'"[104]

The *Harlow* majority did not contest the points made by the Chief Justice. In response to the contention that "the rationale of *Gravel* mandates a similar 'derivative' immunity for the chief aides of the President of the United States,"[105] the Court stated: "Petitioners' argument is not without force. Ultimately, however, it sweeps too far. If the President's aides are derivatively immune because essential to the functioning of the Presidency, so should the members of the Cabinet . . . be absolutely immune. Yet we implicitly rejected such derivative immunity in *Butz*."[106] The Court rested its refusal to follow *Gravel* on the functional approach the Court has taken to immunity law. Stating that "the judicial, prosecutorial, and legislative functions require absolute immunity,"[107] the Court observed that "[t]he undifferentiated extension of absolute 'derivative' immunity to the President's aides . . . could not be reconciled with the 'functional' approach that has characterized the immunity decisions of this Court, indeed including *Gravel* itself."[108] The Court also did not consider the absolute immunity extended to the President in *Nixon v. Fitzgerald* to be inconsistent with its "functional" approach. That immunity, the Court

100. *Id.* at 621.
101. *Id.* at 621–22 (footnote omitted).
102. 102 S. Ct. 2727, 2741–44 (1982) (Burger, C.J., dissenting).
103. *Id.* at 2742.
104. *Id.* at 2742–43 (citations omitted) (quoting *Gravel*, 408 U.S. 606, 618 (1972)).
105. *Id.* at 2734.
106. *Id.* (footnotes omitted).
107. *Id.* at 2735.
108. *Id.* (footnote omitted).

stated, "derives in principal part from factors unique to his constitutional responsibilities and station."[109] Actions against other executive officers, including Presidential aides, however, "generally do not invoke separation-of-powers considerations to the same extent as suits against the President himself."[110]

B. *The Inadequacy of* Harlow*'s Basis for Distinguishing* Gravel

The Court's broad, functional basis for distinguishing *Gravel* leaves several important questions unanswered. First, the Court did not contend that the day-to-day work of presidential aides is less critical to the President's performance of his constitutional duties than the comparable work of congressional aides is to the performance of the constitutional duties of Members of Congress. Did the Court, then, consider it acceptable, within the constraints of the separation-of-powers doctrine, to restrain the exercise of presidential authority, despite its grant of absolute immunity in *Nixon v. Fitzgerald*? And, if the Court did, what were the policy justifications for its view? Second, the Court failed to explain its questionable observation that actions against presidential aides "generally do not invoke separation-of-powers considerations to the same extent as suits against the President himself."[111] If actions against congressional aides invoke separation-of-powers considerations sufficiently to require the immunity extended in *Gravel*, then why do not actions against presidential aides likewise invoke such considerations sufficiently to warrant a comparable extension of immunity in *Harlow*? Third, the Court made a significant misuse of precedent when it stated: "If the President's aides are derivately immune because essential to the functioning of the Presidency, so should the members of the Cabinet . . . be absolutely immune. Yet we implicitly rejected such derivative immunity in *Butz*."[112] *Butz* did not involve any claim of derivative immunity; while *Butz* properly was used as precedent for *Harlow*'s holding that presidential aides can claim only qualified discretionary-function immunity, it was improperly used as precedent on the derivative immunity issue. The question posed by *Harlow*, which was not involved in *Butz*, is why the absolute immunity of the President should not "derive" to the benefit of aides—be they White House staff members, cabinet officers, or other subordinates—while the absolute immunity of Members of Congress does? If presidential functions warrant absolute immunity, then, under the rationale of *Gravel*, why does that immunity not logically also extend to the service of subordinates that is "critical to the [President's] performance?"[113]

By leaving these questions unanswered, the Court's opinion gives some cogency to the Chief Justice's argument that *Harlow* cannot be reconciled with *Gravel* on a defensible basis. This difficulty with the opinion, however, probably results from a more fundamental flaw in the Court's treatment of the derivative immunity issue: the Court neither defined derivative immunity nor examined its purpose. By relying on

109. *Id.* at 2735 n.17.
110. *Id.*
111. *Id.*
112. *Id.* at 2734 (footnote omitted).
113. *Gravel*, 408 U.S. 606, 617 (1972).

*Butz* for both its discretionary-function and derivative immunity holdings, the Court overlooked their discrete functions. Only if the distinct roles of the two immunities are identified can the proper questions concerning their applicability be addressed. These questions were not addressed in *Harlow*, and, consequently, its precedential significance is difficult to assess.

## V. Derivative Immunity in *Harlow* and *Gravel*

### A. *Derivative Immunity Defined*

Derivative immunity is a defense that long has been used to protect persons from liability when acting in compliance with court orders valid on their face and not clearly beyond the jurisdiction of the issuing court.[114] The defense also has been used to protect subordinate officers acting under the directives of superiors in the executive and legislative branches of government;[115] in these instances, however, the contours of the defense have not been developed as clearly as in the less complex judicial area. This Article will propose a definition of the requirements and purpose of derivative immunity—a task the Supreme Court has not undertaken in a comprehensive way in its immunity decisions. The Article then will apply this definition to *Gravel* and *Harlow*, taking the position that legitimate bases exist for reconciling these two decisions. The Court's overly broad functional rationale masks other, more defensible distinctions between the two cases. Once these distinctions are uncovered, the Article will also identify some unanswered questions concerning the immunity of both presidential and congressional aides.

Proper application of derivative immunity requires an understanding of its role in the overall scheme of official immunities. Official immunities are extended to protect the decisionmaking functions of government officers when the public interest in effective performance of an official function is considered to outweigh the plaintiff's interest in civil redress for an injury.[116] As previously noted, government officers exercising judicial, prosecutorial, legislative, and "discretionary" executive functions are protected by some degree of official immunity from civil liability.[117]

It is well established that not every official decision is "discretionary." Rather, a decision receives that designation only if deemed sufficiently important to warrant protection.[118] For the sake of brevity, in the ensuing discussion, judicial, pro-

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114. *See* Sowle, *supra* note 5, at 366–68.

115. *See infra* notes 124–27.

116. *See, e.g.*, *Harlow*, 102 S. Ct. 2727, 2733 (1982); 2 Harper & James, *supra* note 61, at 1640–41.

117. *See supra* notes 52–79 and accompanying text; Restatement (Second) of Torts § 895D (1979).

118. *See, e.g.*, 2 Harper & James, *supra* note 61, § 29.10, at 1640–41.

The authors note:

> Whenever suit is brought against an individual officer because of his official conduct, the court must consider the practical effects of liability and make a value judgment between the social and individual benefit from compensation to the victim, together with the wholesale deterrence of official excess, on the one hand, and, on the other hand, the evils that would flow from inhibiting courageous and independent official action, and deterring responsible citizens from entering public life. The rule of immunity of officers for discretionary acts, and its extension, represent a judgment that the benefits to be had from the personal liability of the officer . . . are outweighed by the evils that would flow from a wider rule of liability.

secutorial, legislative, and "discretionary" executive functions all will be referred to as "discretionary functions," the term denoting those official functions deemed entitled to the protection of official immunity.

Discretionary-function immunity and derivative immunity have a shared purpose: both are designed to protect the discretionary functions of government officials. Their specific roles in service of this purpose, however, are different. The role of discretionary-function immunity is to protect the officer who has made a "discretionary" decision from liability for its consequences. The role of derivative immunity is to protect, not the officer who made a "discretionary" decision, but the subordinate who carried it out. Its immediate effect is to protect the subordinate; its ultimate effect and essential purpose, however, are to protect the discretionary function of the superior. Derivative immunity exists, then, as "a necessary corollary of the superior's privilege."[119]

The operation and purpose of derivative immunity were well described in *Heine v. Raus*,[120] a defamation action, as follows:

> [T]he subordinate who acts with the authorization of the superior is entitled to claim the same privilege as the superior.
>
> If, in defamation cases, recognition of an absolute privilege for judges, legislators and highly placed executive officers of the government, when acting in line of duty, is to serve its intended purpose, it must extend to subordinate officials and employees who execute the official's orders. There would be little purpose to a cloak of immunity for Mr. Barr if Mr. Matteo were allowed to maintain an action for defamation against all of those subordinates in his office who "published" the defamation in the course of handling and distributing the press release. There would be no advantage in protection to a judge against actions for defamation founded upon statements made by him in an official opinion written for his court, if such actions could readily be maintained against his secretary who, at his direction, typed and transmitted the opinion, or against the clerk of the court who published it. If the circumstances impose a compelling moral obligation upon the superior to defend and indemnify the subordinates, immunization of the superior alone from direct defamation actions would be a useless formalism.
>
> Recognition of an absolute privilege of the subordinate by attribution of the superior thus appears to be a necessary corollary of the superior's privilege. It is generally recognized that an agent, acting within the scope of his authority, does have whatever privilege the principal would have enjoyed if he had acted for himself. The principle is applicable in defamation actions and, if an authorized agent would have been privileged, subsequent ratification confers the privilege upon an unauthorized agent.[121]

As stated in *Heine*, one objective of derivative immunity is to prevent the inhibition of the superior's exercise of discretion that would result from placing on

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*Id.* See also Judge Medina's opinion in Ove Gustavsson Contracting Co. v. Floete, 299 F.2d 655, 659 (2d Cir. 1962), *cert. denied*, 374 U.S. 827 (1963).

> There is no litmus paper test to distinguish acts of discretion . . . , and to require a finding of "discretion" would merely postpone, for one step in the process of reasoning, the determination of the real question—is the act complained of the result of a judgment or decision which it is necessary that the Government official be free to make without fear or threat of vexatious or fictitious suits and alleged personal liability?

*Id.*

119. Heine v. Raus, 399 F.2d 785, 790 (4th Cir. 1968).

120. 399 F.2d 785 (4th Cir. 1968).

121. *Id.* at 790–91 (footnotes omitted). In support of the agency principles mentioned in the last paragraph of this quotation, the court cited RESTATMENT (SECOND) OF AGENCY § 345 & comment e (1958).

the superior the "compelling moral obligation" to defend or indemnify a subordinate subjected to a civil action for executing the superior's orders. It should be noted, too, that if public funds are available for the defense or indemnification of a public officer sued for an act performed in the course of his official duties,[122] the superior still might be reluctant to risk the need for this use of public money. Another objective is to protect the exercise of discretion of the superior from refusals of subordinates to execute decisions out of fear of civil liability and from delays in execution of decisions while the subordinate determines whether it would be "safe" to carry out the order.[123] Absent derivative immunity, the discretionary authority of the superior would be diluted; in effect, it would be shared with and diffused among all those charged with execution.

Case law on derivative immunity and logical deductions from its purpose of protecting the discretionary authority of the defendant's superior indicate that there are four requirements a defendant must meet to establish entitlement to derivative immunity. First, the defendant's conduct in question must have been ordered, directed, or approved in advance by the defendant's superior.[124] Second, the defendant must have acted within the scope of his authority when he engaged in that conduct.[125] Third, the conduct must be such that the superior would have been entitled to immunity if he had engaged in the conduct himself.[126] Fourth, extension of derivative

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122. Provision is often made for governmental indemnification of public employees sued for acts performed in the course of their official duties. *See* COMM. ON THE OFFICE OF ATTORNEY GENERAL, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, SOVEREIGN IMMUNITY: THE TORT LIABILITY OF GOVERNMENT AND ITS OFFICERS (1979); Freed, *supra* note 5, at 564 n.182.

123. *See, e.g.*, Kermit Constr. Corp. v. Banco Credito y Ahorro Ponceno, 547 F.2d 1, 3 (1st Cir. 1976). The court asserted:

> At the least, a receiver who faithfully and carefully carries out the orders of his appointing judge must share the judge's absolute immunity. To deny him this immunity would seriously encroach on the judicial immunity already recognized by the Supreme Court . . . . It would make the receiver a lightning rod for harassing litigation aimed at judicial orders. In addition to the unfairness of sparing the judge who gives an order while punishing the receiver who obeys it, a fear of bringing down litigation on the receiver might color a court's judgment in some cases; and if the court ignores the danger of harassing suits, tensions between receiver and judge seem inevitable.

*Id.*; *see also* Potter v. LaMunyon, 389 F.2d 874, 877–78 (10th Cir. 1968) (noting "the obvious confusion in the administration of justice that would follow if . . . officers were called upon to review the legality of court orders at the risk of personal liability"); Gray, *Private Wrongs of Public Servants*, 47 CALIF. L. REV. 303, 318 (1959).

124. *See, e.g.*, Chagnon v. Bell, 642 F.2d 1248, 1255 n.9 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 911 (1981) ("Because the FBI appellees, all subordinates of the Attorney General, engaged in the challenged course of conduct entirely at his direction, it is appropriate in this case that their immunity should flow from his."); Kermit Constr. Corp. v. Banco Credito y Ahorro Ponceno, 547 F.2d 1, 3 (1st Cir. 1976) ("[A] receiver who faithfully and carefully carries out the orders of his appointing judge must share the judge's absolute immunity."); Heine v. Raus, 399 F.2d 785 (4th Cir. 1968). In *Heine* the defendant's answer to a slander complaint alleged that he "acted under the instructions of the CIA when he 'warned' his fellow Legionaires that Heine was a Soviet agent." *Id.* at 787. The court of appeals affirmed the district court's holding "that the absolute governmental privilege was available to a government employee . . . who faithfully executed his instructions, as to one of higher authority exercising discretionary functions within the outer perimeter of his authority." *Id.* at 788 (footnote omitted). The court went on to state,

> We conclude that the absolute privilege is available to Raus if his instructions were issued with the approval of the Director or of a subordinate authorized by the Director, in the subordinate's discretion, to issue such instructions, or if the giving of the instructions was subsequently ratified and approved by such an official.

*Id.* at 791.

125. *See, e.g.*, Eastland v. United States Servicemen's Fund, 421 U.S. 491, 507 (1975); Doe v. McMillan, 412 U.S. 306, 312 (1973); Gravel v. United States, 408 U.S. 606, 628–29 (1972); Heine v. Raus, 399 F.2d 785, 790 (4th Cir. 1968).

126. *See, e.g.*, Eastland v. United States Servicemen's Fund, 421 U.S. 491, 507 (1975) ("Here the complaint alleges that the 'Subcommittee members and staff caused the . . . subpoena to be issued . . . . Since the Members are

immunity to the subordinate must be necessary and appropriate to protect the discretionary authority of the superior; that is, the immunity must have been "delegable."[127]

All these requirements appear to be met in the cases in which the Supreme Court has extended derivative immunity—*Gravel*,[128] *Doe v. McMillan*,[129] and *Eastland v. United States Servicemen's Fund*.[130] One important area of uncertainty exists, however. Although the first requirement—that the conduct in question was ordered, directed, or approved in advance by the superior—appears to be met in these cases,[131] the Supreme Court has not expressly made it a condition for derivative

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immune because the issuance of the subpoena is 'essential to legislating,' their aides share that immunity."); Doe v. McMillan, 412 U.S. 306, 320 (1973) ("Of course, to the extent that they serve legislative functions, the performance of which would be immune conduct if done by Congressmen, these officials [the Public Printer and Superintendent of Documents] enjoy the protection of the Speech and Debate Clause."); Gravel v. United States, 408 U.S. 606, 618 (1972) ("[T]he Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself.").

127. See the justification for extending derivative immunity in *Gravel*, 408 U.S. 606, 616–17 (1972), quoted in the text, *infra*, at note 145. *Cf. Heine*, 399 F.2d 785, 793 (4th Cir. 1968) (Craven, J., concurring and dissenting). Opposing the extension of derivative immunity made by the majority, Justice Craven argued:

> I do not believe the Supreme Court in *Barr* intended that the immunity there recognized should extend to intentional defamation as an instrument of governmental policy. But if I am wrong about that, I suggest that a rule must be fashioned to limit the exercise of intentional defamation to responsible officers and officials. To immunize millions of government subordinate employees from liability for intentionally slandering private persons upon their mere explanation that they were told to do it, and the assertion that it was within the scope of employment, destroys, in my opinion, the balance that was struck in *Barr*. If the CIA must defame someone in order to protect national security, it seems to me it could be done more effectively by the Director himself rather than a secret underling—and with far less danger to a free society.

*Id.*

See also Forsyth v. Kleindienst, 599 F.2d 1203 (3d Cir. 1979), *cert. denied*, 453 U.S. 913 (1981), in which the court rejected a defense of "derivative absolute immunity," but extended qualified immunity to the defendant FBI agents on the basis of the "well established rule that federal law enforcement officers are entitled only to qualified 'or good faith' immunity." *Id.* at 1216. For a criticism of this holding, see Sowle, *supra* note 5, at 373 n.167.

128. 408 U.S. 606 (1972).

129. 412 U.S. 306 (1973).

130. 421 U.S. 491 (1975).

131. For a discussion of *Gravel* on this requirement, see *infra* text accompanying notes 140–42.

Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975), was an action against the Chairman of the Senate Subcommittee on Internal Security, nine other Senators, and the Chief Counsel to the Subcommittee, brought to enjoin implementation of a subpoena *duces tecum* issued by the Subcommittee. The Supreme Court reversed a court of appeals decision that held judicial review available to prevent implementation of the subpoena. The Court held that the defendants' actions "are protected by the Speech or Debate Clause of the Constitution . . . and are therefore immune from judicial interference." *Id.* at 501, *rev'g* 488 F.2d 1252 (D.C. Cir. 1973). Regarding the Chief Counsel, the Court stated:

> Here the complaint alleges that the "Subcommittee members and staff caused the . . . subpoena to be issued . . . under the authority of Senate Resolution 366 . . . ." The complaint thus does not distinguish between the activities of the Members and those of the Chief Counsel. Since the Members are immune because the issuance of the subpoena is "essential to legislating," their aides share that immunity.

*Id.* at 507 (citations omitted). It is clear that the actions of the Chief Counsel that the plaintiffs sought to enjoin were actions ordered, directed, or approved by the Subcommittee.

Doe v. McMillan, 412 U.S. 306 (1973), was an action for damages and an injunction growing out of the publication of a report of a subcommittee of the House Committee on the District of Columbia concerning the D.C. public school system. The report contained "copies of absence sheets, lists of absentees, copies of test papers, and documents relating to disciplinary problems of certain specifically named students." *Id.* at 308 (footnote omitted). Among the defendants were the Chairman and members of the House Committee on the District of Columbia, several members of the Committee staff, and a consultant and an investigator for the Committee. *Id.* at 309. The Court stated:

> [I]t is plain to us that the complaint in this case was barred by the Speech or Debate Clause insofar as it sought relief from the Congressmen-Committee members, from the Committee staff, from the consultant, or from the investigator, for introducing material at Committee hearings that identified particular individuals, for referring the report that included the material to the Speaker of the House, and for voting for publication of the report.

*Id.* at 312. The Court did not discuss specifically what conduct of the Committee staff members was at issue. The

immunity. *Gravel* can even be interpreted as allowing derivative immunity on the basis of the superior's subsequent ratification of the subordinate's conduct.[132] The requirement of a prior order, direction, or approval, however, appears essential if the immunity is to serve its intended purpose of protecting the discretionary functions of the superior. It should be insufficient that the conduct of the subordinate was "authorized" in the broad sense that it was within the scope of his authority or that it was ratified by the superior after the fact. If the conduct at issue was based solely on an exercise of the defendant's judgment, then the proper question to ask is whether the defendant's decision should be protected by discretionary-function immunity.[133]

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complaint, however, alleged that D.C. school officials had given the pertinent documents to the Committee investigator, who in turn gave them to the Committee consultant responsible for the investigation and for the preparation of the report. The consultant allegedly caused the documents to be included in a draft of the Committee report, and the defendant House members approved the report for publication. Joint Appendix at 8, Doe v. McMillan, 412 U.S. 306 (1973). Although the two subordinates may have acted on their own judgment in collecting the material and drafting the report, the allegedly tortious conduct in question was publication of the report. Any publication that occurred by its introduction at Committee hearings would have been approved when the chairman accepted it for introduction. Further publication was approved when the Committee voted to adopt the report and to approve it for publication. The complaint failed to allege that other Committee staff members named as defendants did anything. Brief for Defendants Opposing the Petition for Certiorari at 8 n.10, Doe v. McMillan, 412 U.S. 306 (1973).

132. *Gravel* specifically held that "the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." 408 U.S. 606, 618 (1972). It further stated that "the privilege applicable to the aide [must be viewed] as the privilege of the Senator, and invocable only by the Senator or by the aide on the Senator's behalf . . . ." *Id.* at 621–22 (footnote omitted). Because the Court did not state that prior authorization by the Senator was necessary, this language could be interpreted as allowing derivative immunity on the basis of subsequent ratification. If the opinion is read narrowly in light of the facts of the case, however, this interpretation would seem overly broad. *See infra* text accompanying notes 141–42.

It should be noted that in *Heine* the court of appeals expressly stated that ratification would be sufficient to confer derivative immunity. *See supra* note 121 and accompanying text.

133. It may not always be easy to determine whether the defendant's conduct was based solely on an exercise of his own judgment or was ordered, directed, or approved in advance by the defendant's superior. In resolving this question, however, attention should be focused on the specific conduct at issue in the case.

An interesting case illustrating this point is Grossman v. McKay, 384 F. Supp. 99 (D. Md. 1974). *Grossman* was a defamation action against a development specialist in the Training and Education Branch of the Office of Personnel Management at the National Institute of Health (NIH). The defendant, McKay, was responsible for developing, planning, coordinating, and evaluating clerical training courses and had the duty to discuss training techniques with other government training professionals to make fair and accurate evaluation of these courses. The plaintiff, Grossman, wrote McKay a letter seeking consideration of his shorthand course for NIH employees. McKay made the statement in question about Grossman based on information she received during reference checks with other government agencies, and she made the statements to a government employee whose name the plaintiff had given to her as a reference. The court held that McKay was absolutely immune under either Barr v. Matteo, 360 U.S. 564 (1959), or Heine v. Raus, 399 F.2d 785 (4th Cir. 1968). The court stated as follows:

> Defendant McKay's activities are viewed by the Court as emanating from either a discharge of mandatory duties or premised on the sound exercise of discretionary authority.
>
> . . . [D]efendant McKay's activities may be viewed as discretionary. She is required to make a decision as to whether or not she should recommend to her superiors a particular course. She alone is vested with this duty, and it is upon her recommendation that the Office of Personnel Management acts when it accepts or rejects an offer of training services. The recommendation itself is contingent upon the information she obtains as the result of conversing with other government training specialists. The reciprocal sharing of this information is inextricably interwoven in the entire process.
>
> While defendant's duties or activities may readily be viewed as discretionary, the type of inquiry and interchange she engaged in while evaluating the Quickhand course could with even more justification be viewed as a mandatory activity. As has been clearly demonstrated, her duties emanate from express congressional and administrative mandates. Whether one views her performance of these duties as being required of her by law by virtue of the process of delegation and redelegation, or the result of instructions or directions by her superiors, or even acts subsequently ratified by those superiors, is not controlling. What she did may come under some or all of these heads. The extension of the privilege to defendant in this case is not dependent upon rigid formulae.
>
> What is important is that the policies from which such terms and concepts derive be served. If the congressional policy of procuring qualified, superior training courses for government employees is to be carried

Only if the subordinate's conduct was ordered, directed, or approved in advance by his superior is the superior's discretionary authority at stake in the claim against the subordinate. Absent the superior's prior exercise of judgment concerning the conduct alleged to be wrongful, the subordinate's liability would place no "compelling moral obligation"[134] on the superior to defend or indemnify the subordinate, nor would it threaten future refusals of subordinates to execute the superior's decisions or delays in execution while the subordinate determined whether execution would be "safe."[135]

Analysis of *Gravel* and *Harlow* in light of the above examination of the requirements and purpose of derivative immunity suggests that derivative immunity was properly extended in *Gravel* and properly withheld in *Harlow*. Questions remain, however, about the proper limits on the precedential effects of *Harlow* regarding both presidential and congressional aides.

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policy of procuring qualified, superior training courses for government employees is to be carried out, then the Courts must make certain that those persons on whom is laid the burden of assuring such results be allowed to perform their duties free from concern as to "damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government."
384 F. Supp. 99, 109–10 (D. Md. 1974) (quoting Barr v. Matteo, 360 U.S. 564, 571 (1959)).

Although the court's analysis of discretionary-function immunity was well handled in *Grossman*, the court simply should have rejected any claim of derivative immunity under *Heine*. The proper derivative immunity question was not whether McKay's duties mandated "the type of inquiry and interchange she engaged in while evaluating the Quickhand course," *id.*, but whether her defamatory statements about Grossman had been ordered, directed, or approved in advance by her superior. There is no indication from the facts of the case that they were. The only proper remaining issues, therefore, were whether McKay's decision to make these statements was "discretionary"—that is, whether it was deserving of protection—and whether the statements were made within the scope of her authority. The court gave proper consideration to both of these questions. *See id.* at 110–11.

134. Heine v. Raus, 399 F.2d 785, 790 (4th Cir. 1968).

135. One might suggest that derivative immunity should apply only to "ministerial acts." Indeed its genesis appears to lie in its application to persons exercising purely ministerial functions, who would not qualify for discretionary-function immunity. *See* Sowle, *supra* note 5, at 365–68. But the suggestion does not withstand analysis in light of the purpose of derivative immunity to protect the discretionary functions of the superior. Derivative immunity may be appropriate to serve that purpose, even when the subordinate's acts were discretionary in the sense that they would entitle him to claim qualified discretionary-function immunity.

For example, in Doe v. McMillan, 412 U.S. 306 (1973), the Court appropriately extended absolute derivative immunity to a committee employee who probably would have been entitled to claim qualified discretionary-function immunity for his alleged conduct. (See the facts alleged in *Doe* set forth *supra* note 131.) The plaintiff brought an action for invasion of privacy growing out of the publication of a House subcommittee report. One defendant was the House subcommittee consultant responsible for the investigation and preparation of the draft report adopted by the subcommittee. It seems likely that the consultant would have been entitled to claim qualified discretionary-function immunity because of the importance of the decisionmaking functions involved in the investigation and selection of materials for the report. *Cf.* Benford v. American Broadcasting Cos., 502 F. Supp. 1148, 1156–58 (D. Md. 1980) (Defendant staff members of a congressional investigating team were not entitled to absolute derivative immunity, because their acts were not "legislative." They were, however, entitled to claim qualified immunity if their acts were within the scope of their authority. "There is no rational reason to afford executive investigators greater protection than members of the legislative branch." *Id.* at 1159.). Despite the consultant's probable exercise of discretionary functions, however, the extension of absolute derivative immunity appears appropriate in *Doe* because it was necessary to protect the legislative functions of the members of the House subcommittee who accepted the report and voted for its publication. Absent the absolute derivative immunity of the consultant, the responsible subcommittee members might have felt an obligation to defend or indemnify the employee when he was named a defendant in the suit for invasion of privacy, or they might have been reluctant to risk publication of future reports that could result in the use of public funds to defend or indemnify an employee. In addition, a committee staff member might hesitate to carry out an assignment to investigate and report in a manner having maximum utility to the committee. He naturally would be reluctant to relay any material that might subject him to a lawsuit if the committee, in the exercise of its own judgment, decided to accept and publish the report. The committee members' discretion thus would be restrained by the need for the employee to judge, not what might be of maximum use to the committee, but what might subject him to legal action.

B. *The Applicability of Derivative Immunity in* Gravel

It should be noted that the issue in *Gravel* was derivative testimonial immunity rather than derivative immunity from liability for civil damages. Quite properly, however, the Court in *Harlow* did not distinguish *Gravel* on that basis. The speech or debate clause provides both testimonial immunity and immunity from civil damages liability for "legislative acts,"[136] and the Court has made no significant distinctions regarding the scope of the two kinds of immunity that would affect the use of testimonial derivative immunity as precedent in an action for civil damages.[137] Indeed, the Court used *Gravel* as precedent for the scope of derivative immunity from civil damages liability in *Doe v. McMillan*.[138]

All four of the derivative immunity requirements set forth above[139] appear to have been met in *Gravel*. First, it seems clear that the actions of Rodberg that the Court protected from grand jury scrutiny were actions ordered, directed, or approved in advance by Senator Gravel. The Court's modification of the order entered by the court of appeals did not expressly incorporate this requirement,[140] but it is clear from the record that Rodberg had worked closely with Gravel in preparation for the subcommittee meeting.[141] Indeed Senator Gravel asserted, in his Motion to Intervene in the grand jury proceedings against Rodberg, that all acts performed by Rodberg were under Gravel's "direction and control."[142] Satisfaction of the first requirement demonstrates that extension of derivative immunity in *Gravel* served its intended purpose

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136. Doe v. McMillan, 412 U.S. 306, 312 (1973); *Gravel*, 408 U.S. 606, 616 (1972).

137. That is not to say, however, that the scope of testimonial and evidentiary immunities, on the one hand, and civil damages immunity, on the other, are always the same. *Compare* Nixon v. Fitzgerald, 102 S. Ct. 2690, 2705 (1982) (extending "absolute Presidential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility") *with* United States v. Nixon, 418 U.S. 683 (1974). In *United States v. Nixon* the Court reasoned as follows:

> [W]hen the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality [and does not involve a claim of need to protect military or diplomatic secrets], it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

*Id.* at 713. The Court upheld the power of the district court to issue a subpoena *duces tecum* against the President directing him to produce tape recordings and documents relating to his conversations with aides and advisers for use in connection with a pending criminal proceeding. In Nixon v. Fitzgerald the Court stated that it "has recognized . . . that there is a lesser public interest in actions for civil damages than . . . in criminal prosecutions." 102 S. Ct. 2690, 2704 n.37 (1982) (citations omitted); *see also* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974), discussed *infra* note 191.

138. 412 U.S. 306 *passim* (1973).

139. *See supra* text accompanying notes 124–27.

140. Referring to the order entered by the court of appeals, *see supra* note 95, the Court stated:

> Because the Speech or Debate Clause privilege applies both to Senator and aide, it appears to us that paragraph one of the order, alone, would afford ample protection for the privilege if it forbade questioning any witness, including Rodberg: (1) concerning the Senator's conduct, or the conduct of his aides, at the June 29, 1971, meeting of the subcommittee; (2) concerning the motives and purposes behind the Senator's conduct, or that of his aides, at that meeting; (3) concerning communications between the Senator and his aides during the term of their employment and related to said meeting or any other legislative act of the Senator; (4) except as it proves relevant to investigating possible third-party crime, concerning any act, in itself not criminal, performed by the Senator or by his aides in the course of their employment, in preparation for the subcommittee hearing.

408 U.S. 606, 628–29 (1972) (footnote omitted).

141. *See* Note, *The Speech or Debate Clause Protection of Congressional Aides*, 91 YALE L.J. 961, 962 (1982) (citing United States v. Doe, 332 F. Supp. 930, 937 (D. Mass. 1971)).

142. Motion to Intervene, Record, Joint Appendix at 1, *Gravel*, 408 U.S. 606 (1972).

of protecting the discretionary (here legislative) functions of Rodberg's superior, Senator Gravel. Second, the Court extended derivative immunity from inquiry only with regard to actions of Rodberg taken within the scope of his employment.[143] Third, the Court extended immunity to Rodberg only from "'inquiry into things done by Dr. Rodberg as the Senator's agent or assistant which would have been legislative acts, and therefore privileged, if performed by the Senator personally.'"[144] Last, the Court expressly determined that extension of derivative immunity to legislative aides was necessary and appropriate to protect the legislative functions of Members of Congress that the speech or debate clause was designed to protect. The Court stated:

> Both [the court of appeals and the district court below] recognized what the Senate of the United States urgently presses here: that it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos; and that if they are not so recognized, the central role of the Speech or Debate Clause—to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary—will inevitably be diminished and frustrated.[145]

It would be difficult to quarrel with the determination that the assistance of aides is essential to the Members' adequate performance of their legislative tasks. This broad statement about the importance of the work of aides and the need to treat them as "alter egos" of Members, however, must be read in the context of the whole decision. Specifically, there is no determination in *Gravel* that aides' actions not meeting all the requirements of derivative immunity would be protected by the speech or debate clause. What protection, if any, aides should receive beyond that of derivative immunity will be discussed in a subsequent section of this Article.[146]

### C. *The Inapplicability of Derivative Immunity in* Harlow

Analysis of *Harlow* in light of the requirements and purpose of derivative immunity set forth above[147] demonstrates that the Court's rationale for denying derivative immunity was inapposite. The Court failed to draw a distinction where there is a difference. Instead of examining the discrete operation and purpose of derivative immunity, the Court simplistically employed the same rationale for denying derivative absolute immunity that it used for denying absolute discretionary-function immunity. Instead of asking what effect denial of derivative immunity might have on the discretionary authority of the President, the Court asked only what effect denial might have on the discretionary functions of White House aides.[148]

Examination of the decision and record in *Harlow*, however, suggests that there

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143. See the Court's modification of the court of appeals order, *supra* note 140.
144. 408 U.S. 606, 616 (1972) (quoting United States v. Doe, 332 F. Supp. 930, 937–38 (D. Mass. 1971)).
145. 408 U.S. 606, 616–17 (1972) (citation omitted).
146. *See infra* text subpart VI (B).
147. *See supra* text accompanying notes 124–27.
148. *See* 102 S. Ct. 2727, 2734–35 (1982).

were legitimate bases the Court could have used to distinguish *Gravel* and withhold derivative immunity in *Harlow*. This analysis is complicated by the failure of the defendants to make the best argument available to them for the application of derivative immunity; if the Court failed to present a cogent analysis of the derivative immunity issue, the blame may be placed at least in part on the defendants.

Two very distinct arguments, on very different levels of significance, can be made to support the conclusion that the defendants in *Harlow* were not entitled to derivative immunity. Doubt about the precedential effect of *Harlow* exists in part because it is impossible to tell whether in the future the Court might interpret *Harlow* in one or the other of these lights (if, indeed, either).

The first argument supporting the conclusion that the defendants were not entitled to derivative immunity grows out of the defendants' arguments, which would mandate the conclusion that the first requirement was unsatisfied. The defendants did not claim that their conduct in connection with the Fitzgerald matter was ordered, directed, or approved in advance by the President; to the contrary, they claimed that their conduct was based solely on the exercise of their own independent judgments.[149] In arguing for derivative immunity, the defendants failed to distinguish between the roles of discretionary-function and derivative immunity in protecting the discretionary authority of public officials. In effect, acceptance of their derivative immunity argument would have resulted in absolute immunity of senior White House aides for all of their discretionary functions. Once the Court decided that the general duties of White House aides were not "special functions" warranting absolute discretionary-function immunity under *Butz*,[150] the defendants' derivative immunity argument was bound to fail on its own terms.

The defendants relied upon *Eastland, Doe,* and *Gravel*,[151] but without recognizing that in each of those cases the specific aide's conduct at issue had been ordered, directed, or approved in advance by a Member of Congress or a congressional committee.[152] The defendants argued that "senior Presidential aides . . . should be derivatively accorded *the same absolute immunity as the President*, because the functions they perform are 'essential' to the President's discharge of his constitutional duties."[153] They broadly claimed that "those who directly advise the President in the performance of his public duties or who are directly and intimately involved in the discharge of those duties" require the protection of derivative absolute immunity.[154] Finally, the defendants quoted Mr. Justice Harlan's statement in *Barr v. Matteo*[155] that

149. *See* Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at 2–9, *Harlow* (No claim is made in the defendants' "Statement of the Case" that any of their conduct was ordered, directed, or approved in advance by the President.); Brief for Respondent on Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at 23, *Harlow* ("[N]either petitioner claims to have received a Presidential order to act in this matter; on the contrary, both deny any consultation with the President concerning this case.").

150. 102 S. Ct. 2727, 2733–34, 2735–36 (1982).

151. *See* Petitioners' Brief at 28–29, *Harlow*.

152. *See supra* note 131 and accompanying text.

153. *See* Petitioners' Brief at 29, *Harlow* (emphasis added).

154. Petitioners' Brief at 30, *Harlow*.

155. 360 U.S. 564 (1959).

> [t]he complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy.[156]

This statement, however, is irrelevant to a claim of derivative immunity. It was made in support of a plurality decision (not since overturned by the Court[157]) extending absolute discretionary-function immunity to the Acting Director of the Office of Rent Stabilization in a defamation action. *Barr* held that, in a common-law tort action, a federal officer exercising a discretionary function within the outer perimeter of his authority was entitled to absolute immunity even though he was not a "high-ranking" official. Misapplication of the above-quoted statement from *Barr* as a rationale for derivative immunity would have unfortunate consequences in a *Bivens* action. As previously noted, the Court in *Butz* distinguished *Barr* and held that federal executive officials charged with constitutional violations are entitled to only qualified discretionary-function immunity.[158] The vindication of not only private, but also public interests in constitutional tort actions justifies this lower level of official protection.[159]

Thus, the defendants' arguments for derivative immunity were overly broad and lacked any claim that their conduct was ordered, directed, or approved in advance by the President. As previously observed, however, unless the superior from whom derivative immunity is claimed has exercised his own discretion over the subordinate's conduct in question, the superior's discretionary authority is not at stake in the action against the subordinate.

*Harlow*, then, can be reconciled with *Gravel* on the basis that the *Harlow* defendants failed to satisfy the first requirement of derivative immunity. Viewed in this light, the Court's purported holding that presidential aides are not entitled to claim derivative immunity is far broader than it need have been and was based on the mistaken view set forth by the defendants—that derivative immunity is designed to protect the discretionary functions of a subordinate. In this light, the Court's holding can be viewed as weak and possibly as easily assailable in a future case in which a presidential aide could satisfy the first three derivative immunity requirements.

The second argument supporting the conclusion that the defendants were not entitled to derivative immunity is more fundamental and far reaching than the first. This argument requires that *Harlow* be considered in light of the best theory the defendants could have advanced to satisfy the first requirement of derivative immunity.

The best argument available to the defendants for satisfaction of the first requirement derives from the plaintiff's use of a conspiracy theory.[160] The defendants could have argued that, if the facts were viewed in accordance with the conspiracy theory, those facts would mandate a finding that the first requirement was satisfied.[161] The

156. *Id.* at 573 (footnote omitted), *quoted in* Petitioners' Brief at 30 n.12, *Harlow*.
157. *See Butz*, 438 U.S. 478, 507 (1978) (distinguishing *Barr*, 360 U.S. 564 (1959)).
158. *See supra* notes 73–74 and accompanying text.
159. *See supra* notes 75–76 and accompanying text.
160. *See supra* text accompanying notes 22–24.
161. *See infra* text accompanying notes 164–71.

second and third requirements would seem easily satisfied, as will be discussed below.[162] Denial of derivative immunity, then, could be predicated only on the failure of the defendants to satisfy the fourth requirement: denial would have to be based on the fundamental argument that the discretionary authority of the President should be restricted by the denial of derivative immunity.[163]

In connection with the first requirement, the plaintiff claimed that Nixon, Harlow, and Butterfield conspired to arrange the elimination of Fitzgerald's job and to obstruct any potential rehiring.[164] The plaintiff's theory was that "various conspirators took different actions at different times to further the injurious conduct" and that the plaintiff could establish liability by establishing "an 'affirmative link' between the injurious conduct and 'the adoption of any plan or policy by petitioners—express or otherwise—showing their authorization or approval of such misconduct.'"[165] The plaintiff contended that from the evidence amassed, "a jury could quite properly conclude that the supposed 'office reorganization' was in fact a pretext for a retaliatory termination of respondent's employment and that petitioners knowingly supported, approved, and furthered that termination effort."[166]

The plaintiff claimed the evidence showed that Nixon himself made the decision to terminate Fitzgerald's employment, that Harlow had given advice to Nixon favoring termination, and that Harlow's "advice to President Nixon undoubtedly played a part in the presidential decision to terminate plaintiff's employment."[167] The plaintiff also claimed that Harlow had various conversations with the Secretary of the Air Force on the Fitzgerald matter in which he promoted or endorsed Fitzgerald's dismissal and that it could reasonably be inferred that in one of these conversations they "discussed what story the Air Force would tell Congress to justify Fitzgerald's removal."[168] The plaintiff thus contended that Nixon had made the decision to terminate Fitzgerald's employment and that Harlow's conduct in pursuance of the plan's objectives was approved by Nixon.

To show Butterfield's participation in the conspiracy, the plaintiff relied solely upon oral and written communications from Butterfield to other members of the White House staff. One memorandum was circulated in which Butterfield claimed to have learned that Fitzgerald planned to "blow the whistle" on some "shoddy purchasing practices" by exposing those practices to public view.[169] The plaintiff contended that this memorandum showed that Butterfield "had commenced efforts to secure Fitzgerald's retaliatory dismissal."[170] Another memorandum recommended that Fitzgerald not be reemployed, stating: "Let's let him bleed for awhile. He is 100% disloyal—not without expertise in his field, but nonetheless 100% idsloyal

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162. *See infra* text accompanying notes 172–76.

163. *See infra* text accompanying notes 177–80.

164. Respondent's Brief on Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at 3, *Harlow*.

165. *Id.* at 4 (quoting Rizzo v. Goode, 432 U.S. 362, 371 (1976)).

166. *Id.*

167. *Id.* at 11.

168. *Id.* at 10.

169. *Id.* at 12; 102 S. Ct. 2727, 2731 (1982).

170. 102 S. Ct. 2727, 2731 (1982).

[sic]."[171] Although the plaintiff did not claim that these communications reached the President, they must be viewed in light of the plaintiff's conspiracy theory. If the plaintiff obtained a finding that the three alleged conspirators had agreed to and approved efforts that would forward a retaliatory plan to dismiss Fitzgerald and prevent his reemployment, that finding could include the determination that the President had ordered, directed, or approved in advance the conduct of Harlow and Butterfield upon which the plaintiff relied to show participation in the alleged conspiracy.

Of course, the defendants vigorously contested the plaintiff's conspiracy theory. On summary judgment, however, the defendants appropriately could have argued that, if the facts were viewed in the light most favorable to the plaintiff, his own theory implied that the President had ordered, directed, or approved in advance the defendants' conduct. In this light, the Supreme Court could not have ruled that, as a matter of law, the first requirement was not met.

The second requirement of derivative immunity—that the subordinate acted within the scope of his authority—was contested by the parties.[172] The district court determined that genuine issues of fact existed on this issue.[173] The Supreme Court did not discuss the question, but remanded for resolution of the qualified immunity issue.[174] Thus, the scope-of-authority issue was still alive on remand.

The third requirement—that the superior would have been entitled to immunity had he himself engaged in the conduct in question—seems easily resolved in the defendants' favor. In *Nixon v. Fitzgerald*[175] the Court held that Nixon was absolutely immune against the charge that he participated in the same conspiracy in which Harlow and Butterfield allegedly participated. The Court broadly held the President immune "from damages liability for acts within the 'outer perimeter' of his official responsibility."[176]

If factual issues remained concerning the first three requirements of derivative immunity, rejection of such immunity as a matter of law would have required a determination that the fourth requirement was unsatisfied—that extension of derivative immunity was unnecessary or inappropriate to protect the discretionary functions of the President. This determination is defensible, but only with clear acknowledgment of its significance. If the first three requirements of derivative immunity were met, denial of derivative immunity logically would result in a restraint upon the discretionary authority of the President. Denial, therefore, could be predicted only on the desirability of this result and its acceptability under the separation-of-powers doctrine.

If *Harlow* is taken at face value—if it means that presidential aides may not

171. Respondent's Brief on Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at 13, *Harlow*.

172. *See id.* at 17–22; Petitioner's Reply Brief to Respondent's Brief on Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia at 7 n.6, *Harlow*; Petitioner's Brief at 3–4, 37, *Harlow*; Brief for Respondent at 14, 34–37, 40–41, *Harlow*; Petitioners' Reply Brief at 5–7, *Harlow*.

173. Joint Appendix at 57a–58a, Nixon v. Fitzgerald, 102 S. Ct. 2690 (1982).

174. 102 S. Ct. 2727, 2739–40 (1982).

175. 102 S. Ct. 2690 (1982).

176. *Id.* at 2705.

claim derivative immunity even if they meet the first three requirements of that defense as here interpreted—then the President's discretionary authority may be restrained, perhaps to a significant degree. Presidential aides are entitled to qualified immunity for their discretionary acts, and this immunity as redefined in *Harlow*[177] may give greater protection than before. Nevertheless, their subjection to the possibility of having to defend against civil liability for their conduct could well result in the consequences that derivative immunity is designed to avoid. The President's discretionary authority may be restrained by anticipation of a "compelling moral obligation"[178] to defend and indemnify subordinates or by the perceived need of subordinates to determine for themselves the legal validity of the President's decisions.[179]

Whether the Court intended to restrain the exercise of the President's discretionary authority by denying derivative immunity in *Harlow* is unclear. On one hand, the Court's failure to distinguish between the roles of discretionary-function and derivative immunity suggests that it may not have understood in what way denial of derivative immunity would be likely to restrain the President's exercise of his discretionary authority. On the other hand, the Court made no attempt to refute the Chief Justice's argument that derivative immunity was essential to protect the ability of the President to carry out his constitutional duties.[180]

The question arises, then, whether it is desirable as a matter of policy and acceptable under the separation-of-powers doctrine to place the restraints on the President's discretionary authority that are likely to result from denial of derivative absolute immunity to the President's subordinates. Reasonable arguments can be made that it is.

First, if one views *Nixon v. Fitzgerald*'s extension of absolute immunity to the President as unwarranted,[181] one can take comfort in the denial of derivative immun-

177. *See supra* note 35.

178. Heine v. Raus, 399 F.2d 785, 790 (4th Cir. 1968).

179. The subordinates' caution in executing presidential decisions probably would be a stronger inhibition on the President's discretion than would the "compelling moral obligation," *id.*, to defend or indemnify. In his *Harlow* dissent, the Chief Justice stated as follows:

> The Executive Branch may as a matter of grace supply some legal assistance. The Department of Justice has a long-standing policy of representing Federal officers in civil suits involving conduct performed within the scope of their employment. In addition, the Department provides for retention of private legal counsel when necessary. See Senate Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, Justice Department Retention of Private Legal Counsel to Represent Federal Employees in Civil Lawsuits, 95th Cong., 2d Sess. (1978).

102 S. Ct. 2727, 2743 n.7 (1982) (Burger, C.J., dissenting).

180. *Id.* at 2742–43.

181. For critical views of *Nixon v. Fitzgerald*, see *The Supreme Court, 1981 Term, supra* note 35, at 226–32 (arguing that public policy considerations point to qualified, not absolute, presidential immunity); Note, Nixon v. Fitzgerald: *Presidential Immunity as a Constitutional Imperative*, 32 CATH. U.L. REV. 759 (1983) (extension of absolute immunity to the President is inconsistent with the functional approach taken by the Court and is not justified on the basis of either public policy or the separation-of-powers doctrine); Comment, Nixon v. Fitzgerald: *A Justifiable Separation of Powers Argument for Absolute Presidential Civil Damages Immunity?*, 68 IOWA L. REV. 557 (1983) (supports the qualified immunity privilege for the President, stating that the Court has abdicated its principles by allowing the President to have absolute immunity); 68 CORNELL L. REV. 236 (1983) (supports the application of a functional analysis to the President, stating that grant of absolute immunity was overly broad); 13 SETON HALL L. REV. 374 (1983) (arguing that *Nixon* is broad and inflexible and supporting the functional theory of immunity). For a discussion supportive of *Nixon v. Fitzgerald*, see Casenote, *Absolute Presidential Immunity from Civil Damage Liability:* Nixon v. Fitzgerald, 24 B.C.L. REV. 737 (1983) (stating that absolute presidential immunity is the logical highest step in the progression of varying immunities granted different government officials).

ity in *Harlow*. An author who takes issue with *Nixon v. Fitzgerald* has stated as follows:

> The direct impact of *Nixon* is likely to be modest. Because the President rarely (if ever) acts entirely alone, most injured parties can seek compensation from other officials who influence or implement the offending decision. Moreover, the risk of liability will encourage those other officials to supplement the various institutional and political checks on presidential wrongdoing.[182]

Even if one considers that *Nixon v. Fitzgerald* was correctly decided, however, it is reasonable to argue that the President's absolute immunity for official acts in most cases should be personal and nondelegable and that his authority is properly restrained by the general denial of derivative immunity to his subordinates. The Court's decisions granting only qualified immunity in constitutional tort actions to persons other than the President exercising executive functions reflect its view that the traditional interests protected by official immunity—fairness and fearless decisionmaking[183]—must give way in part to the competing need for redress of personal injury and deterrence of constitutional wrongs.[184] In defending the grant of only qualified immunity for the protection of executive functions, one commentator has stated: "[O]ne can ask just how 'fearless' we want our officials to be. Our tendency to take for granted the good faith and reasonableness of our officials is, in light of recent events, probably gone forever. A little chastening of the ardor of public officials is probably a good thing."[185] He further stated, "It may not be too much of an exaggeration to suggest that erosion of the presumption of official good faith and reasonableness during the Watergate period contributed to the abandonment of absolute executive immunity."[186]

If one assumes that *Nixon v. Fitzgerald* was correct in holding that the separation-of-powers doctrine requires absolute immunity of the President in a *Bivens* action, it does not necessarily follow that the doctrine also requires the absolute derivative immunity of his aides, even though the denial of that immunity would, to a degree, intrude on the authority and function of the President's office. Absent the constraints imposed by the concept of justiciability,[187] the separation-of-powers doctrine clearly allows the Court to determine whether the President and his subordinates have exceeded the scope of their constitutional powers.[188] In *United States v.*

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182. *The Supreme Court, 1981 Term, supra* note 35, at 232. The author further observes:

> There is some risk that the President will act alone more frequently in an effort to shield other officials and will thereby circumvent these compensating factors and increase the risk of ill-considered acts. However, few significant decisions could be implemented solely by the Chief Executive.

*Id.* at 232 n.46.

183. *See supra* note 51 and accompanying text.

184. *See supra* text accompanying notes 60–79; Freed, *supra* note 5, at 548–51.

185. Freed, *supra* note 5, at 564.

186. *Id.* at 564 n.181.

187. For a discussion of the many faceted concept of justiciability, see Powell v. McCormack, 395 U.S. 486, 516–19 (1969).

188. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (holding that President Truman exceeded the scope of his constitutional powers when he issued an order directing his Secretary of Commerce to take possession of and operate most of the nation's steel mills); United States v. Nixon, 418 U.S. 683, 704–05 (1974). In *United States v. Nixon* the Court stated:

> Notwithstanding the deference each branch must accord the others, the "judicial Power of the United States" vested in the federal courts by Art. III, § 1, of the Constitution can no more be shared with the Executive Branch

*Nixon*[189] the Court refused to recognize both a claim of presidential immunity from judicial process and a claim that the President is the final arbiter of the scope of executive privilege.[190] Reserving for itself the right to determine the scope of that privilege, the Court stated, "Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government."[191] The Court weighed the competing constitutional concerns against the dangers of intrusion on the authority and function of the executive branch[192] and held that "[t]he generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial."[193] In *Nixon v. Fitzgerald* the Court again asserted that a claim of presidential immunity requires the Court to "balance the constitutional weight of the interest to be served [by an exercise of jurisdiction over the President] against the dangers of intrusion on the authority and function of the Executive Branch."[194] Although the Court upheld the President's position, it expressly affirmed its own authority to determine the bounds of presidential power.

In *Butz* the Court recognized that a *Bivens* action involves a charge that the defendant official has exceeded the scope of his constitutional powers.[195] The Court

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than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of the separation of powers and the checks and balances that flow from the scheme of a tripartite government. We therefore reaffirm that it is the province and duty of this Court "to say what the law is" with respect to the claim of privilege presented in this case.

*Id.* (citations omitted).

189. 418 U.S. 683 (1974).

190. *See supra* note 188.

191. 418 U.S. 683, 704 (1974). Not every claim of presidential immunity, however, has been regarded as "justiciable." Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974), involved a suit by a Senate select committee to enforce a subpoena *duces tecum* served on President Nixon for production of tape recordings of conversations between the President and his former Counsel, John W. Dean, III. In an opinion by Judge Bazelon the court refused to enforce the subpoena because

the need demonstrated by the Select Committee in the peculiar circumstances of this case, including the subsequent and on-going investigation of the House Judiciary Committee, is too attenuated and too tangential to its functions to permit a judicial judgment that the President is required to comply with the Committee's subpoena.

*Id.* at 733. Concurring, Judge Wilkey would have held that the issue presented was "a political question and therefore not justiciable." *Id.* at 734 (Wilkey, J., concurring).

The court observed that the case was

the first such case in our history [to call upon the court] to exercise the equity power of a court at the request of a congressional committee, in the form of a judgment that the President must disclose to the Committee records of conversations between himself and his principal aides.

*Id.* at 733. For conflicting views as to the justiciability of a case asking the judiciary to resolve a dispute over executive privilege between the legislative and executive branches, see Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1425–26, 1431–32 (1974) (opposing judicial resolution); Dorsen & Shattuck, *Executive Privilege, the Congress and the Courts*, 35 OHIO ST. L.J. 1, 23, 40 (1974) (favoring judicial resolution).

192. 418 U.S. 683, 707 (1974) ("Since we conclude that the legitimate needs of the judicial process may outweigh Presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch.").

193. *Id.* at 713.

194. 102 S. Ct. 2690, 2704 (1982).

195. *Butz* recognized that the question whether an official has exceeded the constitutional or statutory limits on his powers is different from the question whether he acted within the "scope of his authority" for purposes of granting absolute or qualified discretionary-function immunity. Thus, the Court stated that "[i]f any inference is to be drawn from [Spalding v. Vilas, 161 U.S. 483 (1896)] it is that the official would not be excused from liability if he failed to observe obvious statutory or constitutional limitations on his powers or if his conduct was a manifestly erroneous application of the statute." 438 U.S. 478, 494 (1978). The Court also stated:

refused to extend an absolute discretionary-function immunity to executive officers as a class because "[i]f, as the Government argues, all officials exercising discretion were exempt from personal liability, a suit under the Constitution could provide no redress to the injured citizen, nor would it in any degree deter federal officials from committing constitutional wrongs."[196] In granting absolute immunity to the President in *Nixon v. Fitzgerald*, the Court observed the President's "unique position in the constitutional scheme"[197] and stressed the consideration that, because of the President's special visibility and vulnerability to lawsuits, the distraction from his constitutional duties that could result from the lack of absolute immunity would be highly detrimental to the effective operation of the executive branch of government.[198] It is reasonable to consider, however, that the President should have absolute immunity to avoid detrimental distraction from his uniquely broad and important constitutional duties, but that the interests in fairness and fearless decisionmaking should give way in part to competing constitutional interests. Thus, the Court reasonably could determine, within the confines of the separation-of-powers doctrine, that effective operation of the executive branch of government requires absolute immunity of the President from civil liability for constitutional wrongs, but generally does not require that the President be insulated from a "compelling moral obligation"[199] to defend or indemnify subordinates subjected to *Bivens* actions for their execution of presidential decisions or that he be protected from the perceived need of subordinates to judge for themselves the constitutionality of presidential decisions for fear of civil litigation and possible liability if they are wrong. To echo Freed, in the post-Watergate period, "one can ask just how 'fearless' we want our [President] to be."[200]

It is also defensible generally to deny derivative immunity to presidential subordinates while extending it to judicial and legislative aides. The absolute immunity of judges and the derivative immunity of their subordinates applies only to judicial

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The liability of officials who have exceeded constitutional limits was not confronted in either *Barr* or *Spalding*. Neither of those cases supports the Government's position. Beyond that, however, neither case purported to abolish the liability of federal officers for actions manifestly beyond their line of duty; and if they are accountable when they stray beyond the plain limits of their statutory authority, it would be incongruous to hold that they may nevertheless willfully or knowingly violate constitutional rights without fear of liability.

*Id.* at 495.

196. 438 U.S. 478, 505 (1978).

197. 102 S. Ct. 2690, 2702 (1972).

198. The Court stated as follows:

Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government. As is the case with prosecutors and judges—for whom absolute immunity now is established—a President must concern himself with matters likely to "arouse the most intense feelings." Yet, as our decisions have recognized, it is in precisely such cases that there exists the greatest public interest in providing an official "the maximum ability to deal fearlessly and impartially with" the duties of his office. This concern is compelling where the officeholder must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system. Nor can the sheer prominence of the President's office be ignored. In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages. Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment not only of the President and his office but also the Nation that the Presidency was designed to serve.

*Id.* at 2703 (citations and footnotes omitted).

199. Heine v. Raus, 399 F.2d 785, 790 (4th Cir. 1968).

200. *See supra* note 185 and accompanying text.

functions.[201] Judicial discretion and independence are essential to the fair administration of justice and are constrained by controls inapplicable to the exercise of presidential power.[202] The absolute immunity of Members of Congress and the derivative immunity of their aides apply only to "legislative acts," not to all "official acts" they routinely perform in carrying out their representative functions.[203] In *Nixon v. Fitzgerald* the President's absolute immunity was held to apply to all "official acts" within the outer perimeter of his authority.[204] Thus, the derivative immunity of presidential aides would result in far greater potential for abuse of constitutional power than would such extension to judicial or congressional subordinates.[205] It is

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201. *See, e.g.*, Stump v. Sparkman, 435 U.S. 349, 362 (1978) (discussing the factors determining whether an act by a judge is a judicial act); Pierson v. Ray, 386 U.S. 547, 554 (1967) (recognizing "the immunity of judges from liability for damages for acts committed within their judicial jurisdiction"); Gregory v. Thompson, 500 F.2d 59, 64 (9th Cir. 1974) (no judicial immunity to charge that justice of the peace forcibly removed the plaintiff from the courtroom, because act charged was "not an act of a judicial nature"); Lynch v. Johnson, 420 F.2d 818, 820 (6th Cir. 1970) ("We believe that the pleadings in this case cannot be read as revealing that defendant Johnson was performing any judicial act during the meeting of the Fayette County Fiscal Court," which had only legislative and administrative powers.).

202. *See Butz*, 438 U.S. 478, 512 (1978).

203. Doe v. McMillan, 412 U.S. 306, 313 (1973) ("Our cases make perfectly apparent . . . that everything a Member of Congress may regularly do is not a legislative act within the protection of the Speech or Debate Clause."); Gravel v. United States, 408 U.S. 606, 625 (1972) ("That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature.").

204. 102 S. Ct. 2690, 2705 (1982).

205. That is not to say, however, that derivative immunity never should be extended to presidential subordinates. *See infra* text accompanying note 207.

In arguing against the defendants' claim of derivative immunity in *Harlow*, the plaintiff made an overly broad contention about the potential for abuse of power if presidential aides were given derivative immunity. Referring to Halperin v. Kissinger, 606 F.2d 1192 (D.C. Cir. 1979), discussed *supra* note 29, the plaintiff stated as follows:

> In the argument before this Court in *Halperin*, the Solicitor General urged that the President should be accorded an absolute immunity from civil damage actions and that such immunity should be "derivatively" extended to those officials "carrying out the President's orders." But, of course, a vast array of public officials and others may be said to be engaged in carrying out and implementing the numerous executive orders, directives, regulations and other policies which emanate from the President on virtually a daily basis. To this respondent it appeared that the Solicitor General did not have a satisfactory answer to the vexing question of how far down the chain of command such derivative immunity can legitimately extend. But without a clear answer, a rule of absolute immunity for those implementing Presidential orders and policies essentially immunizes the entire Executive Branch from civil liability.

Respondent's Brief on Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia at 22–23, *Harlow*. In a footnote to this statement, the plaintiff further argued as follows:

> The proposed "derivative" immunity also raises the serious question of whether this Court wishes to decree protection for all government officials who can contend, and possibly prove, that they were "simply following orders." At Nuremberg, this nation emphatically rejected that line of defense, even in the case of military officers carrying out orders in wartime, and respondent doubts that its resurrection in the instant context would truly benefit the government or its citizens.

*Id.* at 23 n.14.

Use of the specters of immunizing "the entire Executive Branch from civil liability" and of protecting all those who "simply [follow] orders" is dramatic overkill. First, the requirements of derivative immunity, as interpreted in this Article, protect, not all those acting within the scope of their authority, but only those whose specific conduct in question was ordered, directed, or approved in advance by the superior. Although a great many persons in the executive branch no doubt implement presidential directives within the scope of their authority, probably only a small number could claim that their specific conduct alleged to be wrongful had been ordered, directed or approved in advance by the President.

Second, the proposed requirements protect, not all those who follow the orders of a superior, but only those who do so when the superior would have been protected had he carried out the decision himself. In the Nuremberg war crimes trials, those who gave the orders, as well as those who carried them out, were considered war criminals. The Constitution of the International Military Tribunal, established for the trial of war criminals of the European Axis in pursuance of the Agreement of August 8, 1945, signed by the governments of the United States, France, the United Kingdom, and the Soviet Union, provided in title II, article 6, that "[l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the [crimes defined in this Article] are responsible for all acts performed by any person in execution of such plan." Article 7 provided that "[t]he official position

also significant that the general denial of derivative immunity to presidential aides, despite its extension to congressional aides, is consistent with the basic separation-of-powers principle that the constitutional restraints upon the President's power to execute the laws are greater than the constitutional restraints upon Congress' power to legislate.[206]

The decision in *Harlow* can be defended. The flaw in *Harlow* is not its result, but its rationale. If the Court did intend to deny derivative immunity as properly defined, such denial could be justified adequately only on the basis of a frank consideration of the desirability of restraining the discretionary authority of the President and its acceptability under the separation-of-powers doctrine. It is insufficient to say, as did the Court, that the same reasons for denying absolute immunity to the defendants for their exercise of discretionary functions require denial of their derivative immunity.[207]

## VI. QUESTIONS GENERATED BY *HARLOW* CONCERNING THE IMMUNITY OF PRESIDENTIAL AND CONGRESSIONAL AIDES

### A. *The Problems Created by* Harlow *Concerning the Derivative Immunity of Presidential Aides*

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of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment." Article 8 provided that "[t]he fact that the Defendant acted pursuant to order of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires." 1 NUERNBERG MILITARY TRIBUNALS, TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS xi-xii.

Third, the derivative immunity at issue in *Harlow* was from civil damage liability, not criminal prosecution. Clearly, immunity from criminal charges is much narrower than immunity from civil liability. *See, e.g., Gravel*, 408 U.S. 606, 627–29 (1972).

Finally, even if the first three proposed requirements are met, the court should consider whether the superior's discretionary authority warrants the protection of derivative immunity for his subordinate. This is not a "bright line" test, but is as sound and workable as, for example, the test for "discretionary functions." *See supra* note 118 and accompanying text.

206. *See, e.g.*, Humphrey's Executor v. United States, 295 U.S. 602 (1935) (upholding the constitutionality of a federal statute limiting the President's power to remove members of the Federal Trade Commission); Weiner v. United States, 357 U.S. 349 (1958) (holding that the President had no authority to remove at will a member of the War Claims Commission, even though the War Claims Act was silent regarding removal); *see also* Van Alstyne, *A Political and Constitutional Review of* United States v. Nixon, 22 UCLA L. REV. 116 (1974). Commenting upon a reference to McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819) (holding that Congress has power to incorporate a bank), in United States v. Nixon, 418 U.S. 683, 706 n.16 (1974), Van Alstyne made the following observations about the "necessary and proper" clause, U.S. CONST. art. I, § 8, cl. 18:

> But surely the reference to *McCulloch v. Maryland* did not mean to read into article II an implied equivalent of the necessary-and-proper clause which is found only in article I. Indeed, the necessary-and-proper clause in article I itself forbids any such inference to be drawn from the silence of article II. Thus, the clause provides in full (and note particularly the second half of the clause):
>
> > [Congress shall have power] to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.
>
> It would appear to be plain from this provision that insofar as some larger zone of executive privilege might *by Congress* be deemed appropriate and expedient for the President to have, more generous by far than what a court would regard as a minimal privilege indispensable to the performance of the President's express constitutional powers (*e.g.*, a privilege of confidentiality respecting specific troop locations during a time of military emergency as an indispensable incident of his express power as Commander in Chief), the necessary-and-proper clause permits *Congress* to provide for that more generous zone of privilege. But precisely because the Constitution expressly commits all such questions of executive convenience and expediency solely to Congress and leaves nothing to inference or implication from the silence of article II, there is no room left for any court to analogize any broadly implied power of executive privilege from article II itself.

Van Alstyne, *supra*, at 118–19 (footnotes omitted) (emphases in original).

207. *See* 102 S. Ct. 2727, 2734–35 (1982).

The Court's use of a broad "functional" rationale for distinguishing *Gravel* appears too simplistic to produce an appropriate result in all cases. Its approach would seem categorically to rule out the use of derivative immunity for executive functions, except perhaps when national security or foreign policy is involved.[208] This approach, however, in some circumstances might restrain the President's discretionary authority unduly, and in other circumstances, insufficiently. At one extreme, it might result in the denial of derivative immunity to a subordinate exercising purely ministerial functions on direct order of the President. Surely, however, every White House secretary who transcribes and forwards presidential directives should not be required to review the validity of his actions on pain of potential litigation. Denial of derivative immunity in this situation not only would seem unfair to the secretary, but also would unduly restrain the President's discretionary authority. At another extreme, the Court's approach might result in the automatic extension of derivative immunity to a subordinate acting under presidential directives solely because they concerned national security or foreign affairs. Absolute derivative immunity in such a case, however, should not be extended simply because of the subject matter of the directives. A defensible decision would require consideration by both the parties and the Court of the desirability of restraining the President's discretionary authority on the facts of the case at hand, with due consideration to the interests in compensating the victim of a constitutional violation and in deterring the abuse of official power.

It is uncertain, however, that the Court would adhere to its approach in a future case involving a claim of derivative immunity by a presidential aide. Because the Court failed in *Harlow* to distinguish between the operation of discretionary-function and derivative immunity, it is conceivable that the Court would modify its approach if an aide could distinguish *Harlow* by showing that the first three requirements had been met. As discussed above, the first basis for reconciling *Harlow* and *Gravel* rests upon the defendants' failure in *Harlow* to argue that the first requirement had been met and to distinguish between the objectives of discretionary-function and derivative immunity.[209] The second argument discussed above for a defensible reconciliation of the two cases,[210] however, is considerably closer than the first to the Court's reasoning in *Harlow*. The second argument recognizes a "functional" rationale for denying derivative immunity, as a general rule, to presidential subordinates, while extending it to congressional aides. It does so, however, only on the basis of a direct determination of the desirability of restraining the President's discretionary authority by the denial of derivative immunity to his aides in most circumstances. Although it is impossible to predict how the Court in the future might construe *Harlow* on the derivative immunity issue, the better course would be to construe it, not as a weak precedent, easily assailed if a presidential aide could satisfy the first three requirements, but as a firm precedent for denying derivative immunity to presidential aides absent a clear showing for its need.

208. *See supra* notes 84–85 and accompanying text; *see also* 102 S. Ct. 2727, 2735–36 n.19 (1982).
209. *See supra* text accompanying notes 149–59.
210. *See supra* text accompanying notes 160–205.

### B. *The Problems Created by* Harlow *Concerning the Discretionary-Function Immunity of Congressional Aides*

Flaws in *Harlow*'s treatment of derivative immunity generate questions about its effect on future cases involving not only presidential aides, but congressional aides as well. The question left in doubt as to *presidential* aides concerns their potential entitlement to absolute *derivative* immunity. The question left in doubt as to *congressional* aides is their potential entitlement to absolute *discretionary-function* immunity. Specifically, *Harlow*'s broad functional rationale, together with its mistaken supposition that derivative immunity protects the discretionary authority of the subordinate, rather than the superior, could result in the inappropriate extension of absolute immunity to congressional aides carrying out "legislative functions" within the scope of their authority but solely in the exercise of their own judgment.

As previously noted, the Court's decisions concerning the derivative immunity of congressional aides are consistent with the requirements for derivative immunity as interpreted in this Article.[211] The Court has denied derivative immunity when the third requirement was not satisfied—that is, when the defendant's superior would not have been immune had he executed his decision himself.[212] And the Court no doubt would deny it if the second requirement was not satisfied—that is, if the defendant was not acting within the scope of his authority.[213] The Court has yet to consider a case, however, in which all the requirements were met except the first, which mandates that the defendant's actions were ordered, directed, or approved in advance by his superior. The Court has not expressly made this a requirement, and *Gravel* can be broadly interpreted as allowing derivative immunity on the basis of subsequent ratification.[214] In this situation, the aide should not be held entitled to derivative immunity, because the discretionary authority of the superior is not at stake. The proper issues to address are whether the aide is entitled to discretionary-function immunity, and if so, whether absolute or qualified immunity is the appropriate level of protection.

Extended to its logical extreme, however, the flawed reasoning of *Harlow* would lead to an inappropriate extension of "derivative" absolute immunity in this situation. *Harlow* distinguished *Gravel*, not because either the first or fourth requirement of derivative immunity was unsatisfied, but because *Harlow* involved executive rather than legislative functions.[215] Moreover, although the first requirement was met

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211. *See supra* notes 124–30 and accompanying text.

212. *See* Doe v. McMillan, 412 U.S. 306, 314–16 (1973); *Gravel*, 408 U.S. 606, 624–29 (1972).

213. *Cf.* Wheeldin v. Wheeler, 373 U.S. 647 (1963).

214. *See supra* note 132 and accompanying text.

215. In rejecting the defendants' argument that "the rationale of *Gravel* mandates a similar 'derivative' immunity for the chief aides of the President," 102 S. Ct. 2727, 2734 (1982), the Court first stated that it had "implicitly rejected such derivative immunity in *Butz*," *id.*, and then reasoned as follows:

> Moreover, in general our cases have followed a "functional" approach to immunity law. We have recognized that the judicial, prosecutorial, and legislative functions require absolute immunity. But this protection has extended no further than its justification would warrant. In *Gravel*, for example, we emphasized that Senators and their aides were absolutely immune only when performing "acts legislative in nature," and not when taking other acts even "in their official capacity." . . . The undifferentiated extension of absolute "derivative"

in *Gravel*, *Harlow* suggested that an aide of a Member of Congress is entitled to absolute "derivative" immunity as long as he has performed a legislative function that would have been protected if performed by the Member himself.[216].

A congressional aide, however, who performs a legislative function within the scope of his authority, but without his act being ordered, directed, or approved in advance by a Member of Congress, should be entitled at most to qualified immunity.[217] That the act is "functionally" legislative should be insufficient to justify absolute immunity. Strong policy reasons for limiting protection to qualified immunity are that congressional aides have great power in today's large congressional bureaucracy and that they lack the political accountability of Members of Congress.

In opposing the extension of speech or debate clause immunity to congressional aides "for facially legislative acts that they undertake of their own accord," a recent *Yale Law Journal* Note[218] comments on the power and size of today's congressional bureaucracy. With thorough documentation, it states as follows:

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immunity to the President's aides therefore could not be reconciled with the "functional" approach that has characterized the immunity decisions of this Court, indeed including *Gravel* itself.

*Id.* at 2735 (citations and footnotes omitted).

216. The Court stated:

In *Gravel* we endorsed the view that "it is literally impossible . . . for Members of Congress to perform their legislative tasks without the help of aides and assistants" and that "the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos. . . ." Having done so, we held the Speech and Debate Clause derivatively applicable to the "legislative acts" of a Senator's aide that would have been privileged if performed by the Senator himself.

*Id.* at 2734 (citations omitted).

217. It has been held that Members of Congress and congressional aides are entitled to claim qualified immunity for acts performed within the scope of their authority but not considered "legislative acts" entitled to speech or debate clause protection. *See* Davis v. Passman, 544 F.2d 865, 881 (5th Cir. 1977) ("The inapplicability of speech or debate protection does not foreclose Representative Passman from asserting the same qualified immunity available to other government officials."), *aff'd in part and vacated in part en banc*, 571 F.2d 793 (5th Cir. 1978), *rev'd on other grounds*, 442 U.S. 228, 246 n.25 (1979) ("The en banc Court of Appeals did not reach [the issue whether Passman could claim qualified immunity], and accordingly we express no view concerning its disposition by the panel."); Benford v. American Broadcasting Cos., 502 F. Supp. 1148, 1156–58 (D. Md. 1980) (Defendant members of a congressional investigating team were not entitled to derivative immunity under the speech or debate clause, because their acts were not "legislative"; they were, however, entitled to claim qualified immunity if their acts were within the scope of their authority.); *see also* McSurely v. McClellan, 553 F.2d 1277, 1291 n.50 (D.C. Cir. 1976) (en banc) ("[T]here may be available to [the defendant] a qualified defense to the damages action (not an absolute immunity from suit) of 'good faith and reasonable belief in the validity of the search.'").

The issue posed in the text, however, differs from that considered in these cases. The former issue involves performance by the aide of a "legislative act," while the latter does not.

218. Note, *supra* note 141. This Note focuses upon the holding in *Gravel* that "the privilege applicable to the aide [must be viewed] as the privilege of the Senator . . . invocable only by the Senator or by the aide on the Senator's behalf . . . ." 408 U.S. 606, 621–22 (1972) (footnote omitted). The Note considered this holding too broad, because it "permits aides to assert speech or debate clause protection directly, subject only to a Member's veto." Note, *supra* note 141, at 962. The Note considered that "by affording aides the opportunity to invoke immunity for acts they undertake on their own accord, the *Gravel* holding invites abuse." *Id.* The Note proposes that an aide should be entitled to immunity under the clause only when "(a) that immunity is invoked by the Member, and (b) the Member's motion to dismiss a suit, or to quash a subpoena, includes an affirmation that the aide was in fact acting on the Member's behalf." *Id.* at 972.

Although this proposal has merit, it appears to allow immunity to be conferred by ratification, contrary to the position taken in this Article. *See supra* text accompanying notes 132–35. Moreover, the Note's proposal would leave unprotected an aide with a legitimate claim to immunity if the Member had died or was otherwise unable to invoke the immunity. The Note is correct in stating that derivative immunity should not protect aides "for acts they undertake on their own." *See* text subpart VI (B). It would appear, however, that sufficient insurance against such use of derivative immunity is provided if the aide must establish by competent evidence that his actions were ordered, directed, or approved in advance by the superior, and that the other three requirements proposed in this Article are met as well.

> By any measure, the workload of Congress has expanded enormously in the last several decades. Staff sizes have been enlarged dramatically to keep pace. Congressional aides now play vital roles in almost every aspect of the legislative process, from drafting bills and speeches to conducting investigations.
>
> Moreover, recent studies indicate that congressional staff members have become increasingly autonomous and self-directed. Because the demands on a typical Member of Congress are formidable, Members have delegated "enormous authority" to their aides, without having enough time to supervise its exercise effectively. Thus, staff members often write speeches that are directly inserted in the Congressional Record, or committee reports that are widely distributed, without these documents having been read prior to publication by the Members of Congress for whom they were ostensibly prepared. Aides also have a great deal of discretion in running congressional investigations—in deciding what questions to ask and of whom, what investigatory techniques to use, and what materials to place on the public record.
>
> Staff members are hence in a position to vilify or embarrass those whom they do not like or whose causes they oppose. Their temptation to do so can only be increased if they are given the ability to invoke the protection of the speech or debate clause on their own. Unlike Members of Congress, congressional aides are not accountable to the electorate for activities they engage in under the protections of legislative privilege.[219]

Thus, important considerations concerning the size, power, and unaccountability of the congressional bureaucracy provide strong policy arguments for the grant of only qualified discretionary-function immunity to those aides in constitutional tort actions.

The question remains, however, whether the separation-of-powers doctrine, as reflected in the speech or debate clause, mandates absolute immunity for aides for the performance of legislative acts even when the aide's acts were not ordered, directed, or approved in advance by a Member. Is the "functional" difference between legislative and executive activities sufficient to require absolute immunity for the legislative aide, but only qualified immunity for the executive officer, in constitutional tort actions?

The inquiry must begin with the purposes of the speech or debate clause, which itself speaks only of the immunity of Senators and Representatives.[220] In *United States v. Brewster*[221] the Court stated: "The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators."[222] The Court further observed that the immunity "was designed to preserve legislative independence, not

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The Note's proposal also would leave unprotected an aide who acted on the order or direction of his superior if his superior subsequently refused to invoke immunity for the aide. Similarly, the Court in *Gravel* stated that "an aide's claim of privilege can be repudiated and thus waived by the Senator." 408 U.S. 606, 622 n.13 (1972). Waiver of the aide's claim of privilege should be allowed for testimony concerning actions, communications, or motives of the Senator himself, but it would be highly unfair to withhold derivative immunity if requirements two, three, and four were met, and the first was satisifed by proof that the aide had acted under the order or direction of the superior. Moreover, allowing the superior to waive in this situation would not serve the purpose of derivative immunity—protecting the discretionary functions of the superior. A climate in which a subordinate's derivative immunity arbitrarily could be withdrawn would encourage the subordinate to refuse to execute decisions of the superior or to delay execution until the subordinate determined whether it would be "safe" to carry them out.

219. Note, *supra* note 141, at 969–71 (footnote omitted).

220. *See supra* note 38.

221. 408 U.S. 501 (1972).

222. *Id.* at 507.

supremacy."[223] *Gravel* extended the reach of the clause to protect aides in order "to implement its fundamental purpose of freeing the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator."[224] In *Powell v. McCormack*[225] the Court stated that "the purpose of this clause was 'to prevent intimidation [of legislators] by the executive and accountability before a possibly hostile judiciary.' "[226] The Court further stated:

> Our cases make it clear that the legislative immunity created by the Speech or Debate Clause performs an important function in representative government. It insures that legislators are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation.[227]

The question, therefore, is whether absolute discretionary-function immunity of congressional aides is required to insure the integrity of the legislative process, to preserve legislative independence, but not supremacy, and to prevent intimidation of lesiglators by members of the other branches of government. Also relevant is the question whether this immunity is necessary to promote the important constitutional interest in representative government.

The absolute discretionary-function immunity of congressional aides is not required to serve these purposes. It is the courts' normal role within the separation-of-powers framework to declare when another governmental branch has exceeded its constitutional powers.[228] If a Member of Congress violates the constitutional rights of another by performing a legislative act, he is immune from answering in civil damages for his conduct.[229] However, "[t]he purpose of protection afforded legislators is not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions."[230] Like judges and the President, Members of Congress are highly visible and vulnerable to frivolous lawsuits, and their abuses of power are subject to significant restraints. In contrast, any distraction of Members occasioned by the lack of an aide's absolute discretionary-function immunity would be minimal compared with either the lack of absolute immunity of Members themselves or the lack of the absolute derivative immunity of their aides. It is unlikely that congressional employees would be frequent targets of frivolous *Bivens* actions, because they usually lack high visibility. Moreover, their abuses of power are not subject to the direct political restraints applicable to Members of Congress.[231] Rather than promoting representative government, the grant of absolute

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223. *Id.* at 508 (footnote omitted).

224. 408 U.S. 606, 618 (1972).

225. 395 U.S. 486 (1969).

226. *Id.* at 502 (quoting United States v. Johnson, 383 U.S. 169, 181 (1966)). To the same effect, see the quotation from *Gravel*, *supra* text accompanying note 99.

227. 395 U.S. 486, 503 (1969).

228. United States v. Nixon, 418 U.S. 683, 704–05 (1974); Powell v. McCormack, 395 U.S. 486, 521 (1969).

229. Doe v. McMillan, 412 U.S. 306, 312 (1973).

230. *Powell*, 395 U.S. 486, 505 (1969).

231. In the last three decades, the size of congressional staffs has increased dramatically. Committee staffs have increased almost eightfold, while personal staffs have increased fivefold. M. MALBIN, UNELECTED REPRESENTATIVES 4 (1980). Support agency staffs also have grown significantly. *Id.* at 15–17. With this tremendous growth has come increased dependence of elected representatives upon the congressional staffs. The great complexity of modern legislative

discretionary-function immunity to congressional staff members might further diminish the influence of constituents on congressional activity. The fundamental constitutional purpose to deter official abuse of power is also a significant consideration.[232]

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issues and the heavy demands of legislative schedules have caused Members of Congress increasingly to rely on their aides, whose power has grown concomitantly. *Id.* at 4. This situation has caused "many of the elected members [to] fear [that] they are becoming insulated administrators in a bureaucratized organization that leaves them no better able to cope than they were when they did all the work themselves." *Id.* at 5.

In a budget report, Senator Daniel P. Moynihan (D., N.Y.) stated that the staff "takes on a life of its own: it becomes an organization in its own right, and commences to behave like organizations behave." S. REP. No. 68, 96th Cong., 1st Sess. 332 (1979). He further stated that "[w]e become administrators, looking to the activities and the logistical needs of our separate organizations, engaging in ever more complex patterns of cooperation and conflict with other such organizations, much in the manner that bureaucracies cooperate and compete in the executive branch." *Id.* Moynihan concluded by proclaiming, "We make the laws. We must never allow ourselves to become merely the managers of great hierarchical staffs that do this for us." *Id.* at 333.

The power of committee and subcommittee staffs derives in large part from their responsibility for collecting and disbursing information. These staffs can facilitate or obstruct the efforts of elected representatives and their personal staffs to acquire reliable and undistorted information. R. JONES & P. WOLL, THE PRIVATE WORLD OF CONGRESS 138–39 (1979); M. MALBIN, *supra*, at 242–43. Senator Sam Nunn has stated: "We are in the position of being deferential to staff because they have a lot of power and run the subcommittees or committees. They wield power but they are not a responsible part of the process." R. JONES & P. WOLL, *supra*, at 138. Jones and Woll noted:

> Thus staff, which started out as a symbol of status and an adjunct of power, has become a formidable power in its own right. It has emerged as an independent force in Congressional politics. Aides play the same games as their bosses and reap many of the same rewards. And *they* need never face the electorate.

*Id.* at 171 (emphasis in original).

Committee and personal staff members have some indirect responsibility to the electorate, because they serve at the pleasure of their elected employers. There is considerable turnover in staffs, and the least displeasure of the employer may lead to summary dismissal. *Id.* at 129; M. MALBIN, *supra*, at 21. Moreover, their jobs depend upon their employers' remaining in office. R. JONES & P. WOLL, *supra*, at 163. New legislators frequently want to begin with an entirely new, handpicked staff. Jones and Woll asserted: "Ultimately an aide's power stops where the desk of the man who employs him begins. It is a political cliche that Washington is a harsh town, and there are thousands of aides who never understand why their telephone stops ringing the morning after an election." *Id.* at 163–64.

Although aides are indirectly responsible to their employers' constituents, the aides' considerable discretionary authority tends to cause them to "forget that their power is derivative." *Id.* at 164. Such forgetfulness eventually may lead to dismissal, but it also may lead, in the meantime, to abuses of power. See, *e.g.*, *id.* at 162–64, where the authors describe an aide's growing power that ended with his discharge after he had created a wholly fictitious transcript of committee hearings that never took place.

Many personal staff members undoubtedly are motivated by a desire to serve the needs of their employers' constituents, and they may devote most of their time to that end. M. MALBIN, *supra*, at 14. However, members of personal, committee, and support agency staffs are also motivated by their own personal career goals. Many hope to serve "on the Hill" for a few years and then move on to important jobs in the executive branch or to Washington law and lobbying firms. *Id.* at 22. The instability of staff jobs, the relatively low ceiling on salaries, and the desire to be in positions providing greater personal recognition are all factors that have contributed to an increase in the number of staff aides who have strong incentives to model their actions with a view towards their own ultimate career goals. *Id.* at 19–24. Reportedly these incentives rarely lead to direct conflicts of interest. *Id.* at 23. However, they appear to influence some aides to become more conciliatory to the interests of possible future employers as their work proceeds. *Id.* at 104. It cannot be said, therefore, that staff members' sole or even primary goal necessarily is to maximize their employers' responsiveness to constituent interests.

Given that many staff aides have a high degree of discretionary authority, little close supervision by their elected superiors, and personal career objectives outside of Congress, it is clear that staff aides' responsibility to the electorate is significantly weaker than that of Senators and Representatives.

232. An illustrative set of potential immunity issues is raised by a recent news report that the United States House of Representatives has voted unanimously to authorize its ethics committee to investigate alleged alterations in official committee reports. See N.Y. Times, July 1, 1983, at A1, col. 1. Several Republican Members of Congress have charged that their statements at committee hearings were altered to make them look uninformed and ineffective. *Id.*

Should a defamation or other tort action grow out of these events, brought by Members of Congress against congressional staff members, some interesting immunity issues could be raised.

First, if a defendant staff member could establish that his actions had been ordered, directed, or approved in advance by a Member of Congress having responsibility for the committee reports, would the defendant be entitled to derivative speech or debate clause protection? The making of committee reports is a "legislative function" protected by the clause. Doe v. McMillan, 412 U.S. 306, 312–13 (1973). And the motives behind an action are not subject to inquiry in

Of course, the work of a congressional bureaucracy is essential to the effective performance of legislative duties in today's complex governmental system. *Gravel*'s emphasis on the importance of the work of congressional aides as justification for the extension of absolute derivative immunity,[233] however, should not be read as justification for absolute discretionary-function immunity. *Gravel* involved a claim of derivative testimonial immunity in a grand jury proceeding, not a claim of discretionary-function immunity in a constitutional tort action. The independence of legislators is directly implicated in an aide's claim of derivative immunity, but it is not realistically threatened in an aide's claim of discretionary-function immunity. It is the independence of legislators, not mere bureaucratic efficiency, that should be the focus of attention under the separation-of-powers doctrine. Because the most efficient government can also be the most abusive, the checks-and-balances role of the constitutional separation of powers cannot be ignored. Justice Brandeis stated:

> The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.[234]

The constitution's separation of powers into three coordinate branches of government has two purposes—to protect each branch from improper control by another, and to prevent each branch from exceeding its constitutional powers. As Justice Frankfurter observed, "[t]he areas are partly interacting, not wholly disjointed."[235] With due respect for the tension between these two objectives, the Court should not abdicate its chartered role in curbing abuses of official power by immunizing officials from liability for constitutional excesses unless plainly required for the effective functioning of a coordinate branch of government in a constitutional system designed to preserve democratic choice and individual rights.

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determining whether one claiming immunity was acting within the scope of his authority. Nixon v. Fitzgerald, 102 S. Ct. 2690, 2705 (1982); Eastland v. United States Servicemen's Fund, 421 U.S. 491, 508–09 (1975).

The defendant might have difficulty establishing that the Member from whom the claimed immunity "derived" had authority to supervise the making of the reports. The defendant's most difficult task, however, probably would be to prove that any Member had ordered, directed, or approved in advance the alterations. If the defendant could make this showing by competent evidence, however, should derivative immunity be withheld simply on the strength of the Member's denial? See the argument in note 218, *supra*, that the superior should not have a "veto" power over the claim of derivative immunity.

If the defendant could make adequate proof on these issues, it seems likely that he would be entitled to derivative immunity. Immunity properly could be withheld only if the court decided that the fourth requirement was unsatisfied—that is, that extension of derivative immunity would be inappropriate on such facts as those alleged.

Second, if the defendant could establish only that his acts were taken within the scope of his employment, but not that an authorized Member had ordered, directed, or approved in advance the alterations, the question again would arise whether he should be entitled to derivative absolute immunity. As argued in the text, the defendant in this situation should not be entitled to this immunity, even though his conduct involved a legislative act. *See supra* text accompanying notes 211–19.

Third, should the defendant, then, be entitled to a qualified discretionary-function immunity? If the defendant's duty was merely to transcribe the committee proceedings, his conduct should not be regarded as "discretionary." The decision to alter the reports, made by one whose duties were merely to make an accurate transcription, is not the kind of official decision warranting protection. *See supra* note 118 and accompanying text. For such a ministerial function, the defendant should not be protected by any immunity defense. *See* Sowle, *supra* note 5, at 383–93.

233. *See supra* text accompanying note 99.

234. Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting), *quoted in* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 629 (1952) (Douglas, J., concurring).

235. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

## VII. CONCLUSION

In *Harlow v. Fitzgerald*[236] the Supreme Court properly refused to extend absolute immunity to presidential aides in a constitutional tort action, reserving the possibility that certain special functions, such as those involving national security or foreign policy, might warrant such protection. The Court held that presidential aides' discretionary-function immunity is controlled by *Butz v. Economou*,[237] which held that, in constitutional tort actions, cabinet officers are entitled to only qualified immunity for their exercise of purely executive functions. The Court also refused to extend absolute derivative immunity to presidential aides, distinguishing *Gravel v. United States*,[238] which granted such immunity to a congressional aide, on the basis of a "functional" distinction between executive and legislative duties.

The rationale of *Harlow* and *Gravel* fails to take account of significant differences between the purposes of discretionary-function and derivative immunity. Their rationale leaves open the possibilities that presidential aides could be denied absolute derivative immunity when it would be appropriate and that congressional aides could be extended this immunity when it would be inappropriate. A subordinate should be entitled to absolute derivative immunity only if (1) the subordinate's conduct in question was ordered, directed, or approved in advance by his superior; (2) the subordinate acted within the scope of his authority; (3) the superior would have been entitled to absolute immunity had he engaged in the conduct himself; and (4) extension of immunity to the subordinate is necessary and appropriate to protect the discretionary authority of the superior—that is, the immunity is "delegable." These specific, narrowly drawn conditions for the application of derivative immunity are consistent with the purpose of that defense—protection of the discretionary functions of the superior of the defendant governmental employee.

Analysis of *Harlow* on the basis of these conditions indicates that its denial of absolute derivative immunity can be justified on either of two grounds. It can be argued that the first condition was not met because the defendants did not claim that their conduct in question was ordered, directed, or approved in advance by the President. This view of *Harlow* would leave open the possibility that presidential aides would be entitled to absolute derivative immunity in a future case if they could demonstrate that they acted on the orders or direction of the President or with his advance approval. It also can be argued, however, that the first condition would be satisfied if the facts were viewed, as they should have been on the defendants' motions for summary judgment, in accordance with the plaintiff's conspiracy theory. This view of *Harlow* would justify denial of derivative immunity on the ground that the fourth condition, delegability of the President's absolute immunity, was unsatisfied.

The second view of *Harlow* is the better view. It appears consistent with the Court's "functional" basis for distinguishing *Gravel*. It also frankly recognizes the

236. 102 S. Ct. 2727 (1982).
237. 438 U.S. 478 (1978).
238. 408 U.S. 606 (1972).

desirability of viewing the absolute discretionary-function immunity extended to the President in *Nixon v. Fitzgerald*[239] as personal and nondelegable in most circumstances. The restraints upon the President's discretionary functions that would result from the nondelegability of this immunity in most cases are both desirable and justifiable within the contours of the separation-of-powers doctrine. Determination of the delegability of the President's absolute immunity must be made, however, not on the basis of the overly broad "functional" approach the Court employed in *Harlow*, but with clear recognition that denial of derivative immunity operates as a restraint on the President's discretionary authority. Although denial of derivative immunity in *Harlow* was warranted, there may be situations in which its denial would unduly constrain the President's constitutional powers. Determination of the delegability of the President's immunity, therefore, should be made on the basis of a careful appraisal of the probable effects that denial of absolute derivative immunity in a given case would have on the President's authority and the acceptability of those effects under constitutional doctrine.

Analysis of *Gravel* on the basis of the proposed conditions for the extension of absolute derivative immunity indicates that it extended this immunity to a congressional aide on a defensible basis. It is justifiable under the separation-of-powers doctrine to recognize the delegability of speech or debate clause immunity, providing the first three conditions for derivative immunity are also met, while denying delegability of the President's absolute immunity in most instances. Careful distinctions must be made between discretionary-function and derivative immunity, however. The Court's failure to confine derivative immunity within the narrow limits dictated by its distinct purpose could lead to its unwarranted application in constitutional tort actions. Specifically, if absolute immunity were extended to congressional aides when their conduct in question was not ordered, directed, or approved in advance by a Member of Congress operating within the protection of the speech or debate clause, the effect would be to give congressional aides an absolute discretionary-function immunity. Such immunity is not justifiable as essential to the effective operations of Congress, and it would unduly impair the purposes of the constitutional tort action to redress personal injury and deter the abuse of official power.

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239. 102 S. Ct. 2690 (1982).